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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDISON BROTHERS STORES, INC.,

Respondent,

—vs.—

BROADCAST MUSIC, INC.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JONATHAN ZAVIN
Counsel of Record
EDWARD L. POWERS
RICHARDS & O'NEIL
885 Third Avenue
New York, New York 10022
(212) 207-1200

JUDITH M. SAFFER
BROADCAST MUSIC, INC.
320 West 57th Street
New York, New York 10019
(212) 586-2000

SCOTT M. MARTIN
5555 Melrose Avenue
Los Angeles, California 90038
(213) 956-5000

Attorneys for Petitioner

QUESTIONS PRESENTED

A. Whether the Eighth Circuit erred when it ruled that Edison Brothers Stores, Inc. meets the "single receiving apparatus" requirement of the Section 110(5) exemption of the Copyright Act (17 U.S.C. § 110(5)) despite the fact that Edison owns and operates more than 2,000 unlicensed receiving apparatuses.

B. Whether the Eighth Circuit erred when it ruled that Edison Brothers Stores is entitled to invoke the Section 110(5) exemption of the Copyright Act (17 U.S.C. § 110(5)) despite the fact that Edison's stores are all of sufficient size to justify, as a practical matter, subscription to a commercial background music service and Edison is able to afford normal music licensing fees, contrary to the strict limitation consistently imposed by other circuit and district courts.

C. Whether the Eighth Circuit erred when it ruled that Edison Brothers Stores is entitled to invoke the Section 110(5) exemption of the Copyright Act (17 U.S.C. § 110(5)) despite the fact that virtually all of Edison's stores individually exceed the maximum square footage previously permitted under the exemption by other circuit and district courts.

D. Whether the Eighth Circuit erred when it applied the Section 110(5) exemption of the Copyright Act (17 U.S.C. § 110(5)) to Edison Brothers Stores, resulting in the creation of a conflict between U.S. law and the treaty obligations of the United States under the Berne Convention of the Protection of Literary and Artistic Works and inconsistent with the legislation passed by Congress providing for U.S. compliance with the terms of that treaty.

PARTIES TO THE PROCEEDING

Petitioner/Appellant Broadcast Music, Inc. is a non-profit-making corporation formed under the laws of New York. It has no parent companies and no subsidiaries.

Respondent/Appellee Edison Brothers Stores, Inc. is a corporation formed under the laws of Delaware. It has no parent companies; it operates a number of wholly-owned subsidiaries.

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REFERENCE TO OPINIONS BELOW

The following opinions were rendered in this case by other courts:

United States Court of Appeals for the Eighth Circuit:

Edison Brothers Stores, Inc. v. Broadcast Music, Inc. ____ F.2d ____, No. 91-2115 (8th Cir. Jan. 13, 1992). A copy is attached as Appendix A hereto. A copy of the Eighth Circuit's Judgment in this case is attached as Appendix B hereto.

United States District Court for the Eastern District of Missouri:

Edison Brothers Stores, Inc. v. Broadcast Music, Inc. 760 F. Supp. 767 (E.D. Mo. 1991). A copy of the District Court Opinion is attached as Appendix C hereto.

JURISDICTION OF THIS COURT

Petitioner Broadcast Music, Inc. brings this petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in *Edison Brothers' Stores, Inc. v. Broadcast Music, Inc.*, No. 91-2115 (8th Cir. Jan. 13, 1992).

The judgment of the Eighth Circuit was entered on January 13, 1992.

Jurisdiction to review by writ of certiorari the judgment of the Eighth Circuit is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND TREATIES INVOLVED

This case concerns the proper interpretation of 17 U.S.C. § 110(5) (Section 110(5) of the Copyright Act). That interpretation may be affected by the terms of the Berne Convention Implementation Act (102 Stat. 2853 (1988) (codified in 17 U.S.C.)), and the Berne Convention for the Protection of Literary and Artistic Works (an international treaty ratified by Congress).

A. The Applicable Provisions of Title 17 U.S.C.

Section 106 of the Copyright Act gives the owner of the copyright in a musical composition the exclusive right "to perform the copyrighted work publicly." 17 U.S.C. § 106(4). "Performance" of a work is broadly defined to mean to "recite, render, play, dance, or act, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sound accompanying it audible." 17 U.S.C. § 101. To perform a work "publicly" means:

> (1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101. Under these definitions, the playing of a radio in a retail sales establishment open to the public constitutes a "public performance." Accordingly, absent an exemption from liability, the unauthorized performance, via a radio or otherwise, of a musical composition infringes the copyright owner's exclusive right of public performance.

Certain limited exemptions to the exclusivity of the public performing right are set forth in Section 110 of the Copyright Act. Section 110(5) provides:

> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> . . . .
>
> (5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving appa-

ratus of a kind commonly used in private homes, unless—

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public.

17 U.S.C. § 110(5).

B. The Relevant Terms of The Berne Convention Implementation Act

The Berne Convention Implementation Act, 102 Stat. 2853 (1988) (the "BCIA") was enacted by Congress to bring U.S. copyright law into conformity with the Berne Convention, as a step toward U.S. ratification of the Berne Convention. The relevant portions of the BCIA, Sec. 2 and 3 are set forth in Appendix D hereto.

C. The Relevant Terms of the Berne Convention for the Protection of Literary and Artistic Works

On October 5, 1988, the Senate ratified the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention"). On October 12, 1988, the House also ratified the Berne Convention. PL 100-658, 102 Stat. 2853 (1988). The provisions of the Berne Convention which are relevant to this action are set forth in Appendix D hereto.

STATEMENT OF THE CASE

1. Nature of the Case

This lawsuit is the result of a focused effort by Edison Brothers Stores, Inc. ("Edison"), a Delaware corporation headquartered in St. Louis, Missouri, to exploit for its commercial advantage copyrighted music without paying any form of compensation to the writers and publishers of that music. Edison owns and operates more than 2,000 shoe and apparel stores across the country. As a matter of corporate policy, Edison has placed radio receivers in all of its stores. As a matter of corporate policy, music is played over the

radios throughout business hours for the benefit of Edison's customers and employees. A significant amount of the music played by Edison was created and is owned by writers and publishers who are affiliated with and represented by petitioner Broadcast Music, Inc. ("BMI").

Edison contends that it is exempt from the statutory obligation to pay compensation for its public performance of music on the ground that its use falls within a special limited exemption set forth in 17 U.S.C. § 110(5) of the Copyright Act. BMI contends that Edison's use of music does not fall within the narrow parameters of the Section 110(5) exemption, and that Edison is therefore not entitled to use copyrighted music for its own commercial benefit without compensating the creators and owners of the copyrights in such music.

Edison brought this action in the U.S. district court for the Eastern District of Missouri seeking a declaratory judgment that its use of music is exempt. Following discovery, Edison moved for summary judgment and BMI cross-moved for summary judgment.

Prior to the decisions of the lower courts in this case and a similar decision in a case decided at virtually the same time in the Seventh Circuit, *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 754 F. Supp. 1324, *aff'd*, 949 F.2d 1482 (7th Cir. 1991) ("Claire's"),[1] the circuit and district courts that had examined the Section 110(5) exemption had ruled consistently over the years, and Congressional intent clearly indicated, that Section 110(5) of the Copyright Act was a narrow exemption applicable only where a simple radio receiver was being used by a small business of limited size and revenue. Edison admits that it owns and operates more than 2,000 radio receivers, that it has annual revenues in excess of one billion dollars, and that approximately 95% of its unlicensed stores are each larger in square footage than previously permitted for stores seeking to claim the exemption.

The district court below ruled that Edison is entitled to avoid compensating the creators and owners of copyrighted

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1 BMI has, concurrently herewith, filed a petition for writ of certiorari with respect to the Claire's case.

music because it qualifies for the Section 110(5) exemption. The court based its decision on the fact that Edison places only one receiver in each of its stores. The court also ruled that the physical size of the location and the ability of a business to afford a commercial music service are not elements in determining the applicability of the Section 110(5) exemption. The U.S. Court of Appeals for the Eighth Circuit affirmed that decision.

2. Statement of the Facts

a. The Parties

BMI is a performing rights organization that licenses the public performance of copyrighted musical compositions. Performing rights organizations such as BMI and ASCAP evolved because an individual writer's public performing right in musical compositions was virtually impossible to enforce other than on a collective basis; no writer or publisher of copyrighted musical compositions could effectively monitor unauthorized performances of their compositions across the country. 2 *Nimmer on Copyright* § 8.19, at 248.26 (1990).

BMI operates as a non-profit making corporation, distributing all of the licensing fees it collects to the writers and publishers it represents, less only operating expenses and reasonable reserves. (Annastas Aff. ¶ 2, A-511 (all "A-____" references are to the Joint Appendix filed with the Circuit Court)). BMI currently has agreements with more than 100,000 independent songwriters and publishers to act as their non-exclusive agent to license on their behalf the performing rights in the copyrighted music they create. (Annastas Aff. ¶ 2, A-511.) BMI licenses these rights to persons or entities that publicly perform music—including restaurants, retail stores, television and radio stations, concert halls, and nightclubs. (Annastas Aff. ¶ 3, A-512.) Approximately one-half of all of the compositions performed over the radio in this country are licensed by BMI. (Annastas Aff. ¶ 3, A-512.)

BMI offers licenses to retail store operators, such as Edison, which seek to use music from BMI's repertoire. The license permits the licensee, for an annual fee, to publicly

perform all copyrighted musical compositions in the BMI repertoire. (Annastas Aff. ¶ 4, A-512.)

Edison is a major retailer which owns and operates a chain of approximately 2,500 retail stores nationwide. (Complaint ¶ 7, A-8; Litow Deposition Vol. I, pg. 38, A-700.) The stores are owned by the parent corporation (they are not franchisees), and are located primarily in shopping malls. (Litow Deposition Vol. I, pgs. 39-40, 47, A-701-703.) All stores specialize in either fashion apparel or shoes. Edison frequently operates more than one store in a given location. For example, in the City of Houston alone, Edison operates a total of 55 retail stores, and in many instances a number of these stores are in the same shopping mall. (BMI Exhibit 2, A-921-965).[2]

Edison has more than 17,000 employees (BMI Exhibit 5, pg. 1822, A-1075) and annual sales revenues in excess of $1 billion from its retail store operations. (BMI Exhibit 5, pgs. 1796-1798, A-1049-1051.) Edison's gross revenues per store varies from approximately $100,000 annually to more than $1 million annually. (Edison's Response to BMI's Interrogatory No. 13, filed as BMI Exhibit 4, A-1047.) In 1989, the last year for which figures were produced in this litigation, Edison's net profits exceeded fifty million dollars. (BMI Exhibit 5, pg. 1797, A-1050.)

b. Edison's Use of Music

Since 1978, Edison has followed a corporate policy of purchasing radio receivers and installing them in its stores. (Litow Deposition Vol, I, pgs. 61-62, A-704-705; Hoff Deposition pgs. 9-10, A-681-682.) This equipment is purchased by Edison's home office in bulk orders of up to one hundred units at a time. (BMI Exhibits 15, 16, A-1107-1134; Hoff Deposition pg. 11, A-683.) Edison typically purchases the equipment at a fifteen to twenty percent discount. (Edison's Young Aff. ¶ 12, A-70-71; Young Deposition pgs. 7-8, A-774-775; Woods Deposition pgs. 17-18, A-770-771; Hoff Deposition pg. 13, A-685.)

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2 Appendix F to this brief shows the actual location of Edison's stores in the City of Houston, and then for each other city, shows the total number of stores in that city and its surrounding suburbs.

Edison uses these radio receivers to provide music for its customers and employees in almost all of its 2,500 plus stores. (Litow Deposition Vol. I, pgs. 61-62, 94-95, A-704-705, 717-718; Scalia Deposition pg. 9, A-751; Walker Deposition pg. 11, A-767.) Managers of Edison's stores are specifically instructed that the music played in their stores should appeal to their customers and, if possible, should include those radio stations which play Edison's advertisements. (Litow Deposition Vol. I, pgs. 86-88, A-714-716; Liebert Deposition pg. 19, A-689; BMI Exhibits 6-10, A-1079-1096.) According to Martin Sneider, the President of Edison, the purpose of the music in the stores is to create a better ambiance for Edison's customers and employees. (Sneider Deposition pgs. 6-7, A-756-757.) Indeed, Edison considers music to be "essential" to projecting an attractive image to its customers. (BMI Exhibit 6, A-1079; Bradley Deposition pgs. 19-20, A-677-678; BMI Exhibits 11-14, A-1097-1106.) In addition, Edison's policy of providing music helps it to retain employees and encourages greater productivity from those employees. (Litow Deposition Vol. I, pgs. 67-68, A-708-709; Scalia Deposition pgs. 47-48, A-752-753; Tucker Deposition, pgs. 9-10, A-761-762.)[3] As noted above, Edison operates multiple stores in most locations where it does business, and the record indicates that it is likely that radio receivers located in the same city are tuned to the same station. (Deposition of Alan Miller at 22, A-748.)

In approximately 221 of its more than 2,500 stores, Edison either licenses the music directly from BMI or uses a commercial background music service which in turn obtains a license from BMI. (Edison's Norman Aff. ¶¶ 2, 4, A-72-73.) In all of its other stores, with a few scattered exceptions, Edison uses music played over radio receivers connected to two speakers. (Litow Deposition Vol. I, pgs. 65-66, A-706-707.) With the exception of the approximately 221 licensed stores, Edison has refused to enter into licensing agreements with

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3 In support of its cross-motion for summary judgment, BMI also submitted the affidavit of James J. Kellaris, an expert in marketing and consumer behavior, in which he testified as to the benefits accruing to Edison by the use of music in its stores. This affidavit was neither challenged nor contradicted by any Edison submissions. (A-546-558.)

BMI for the use of music in its stores, and is exploiting that music without compensating the creators and owners of the copyrights in that music.

BASIS FOR FEDERAL JURISDICTION

1. Jurisdiction of the District Court

Jurisdiction of the district court was vested in the district court pursuant to 28 U.S.C. § 1338(a) because this action arose under the Copyright Act (17 U.S.C. § 101, et seq.). This action involves a dispute over the application of Section 110(5) of the Copyright Act (17 U.S.C. § 110(5)).

Edison Brothers Stores, Inc. (plaintiff in the district court; appellee in the circuit court; respondent in this proceeding) is a Delaware corporation with its corporate headquarters in St. Louis, Missouri. Broadcast Music, Inc. (defendant in the district court; appellant in the circuit court; petitioner in this proceeding) is a New York corporation, with its principal office in New York. Neither party contested the jurisdiction of the district court or the appropriateness of the venue.

2. Jurisdiction of the Circuit Court

The appeal to the United States Court of Appeals for the Eighth Circuit was taken from the Order of the district court entered on April 3, 1991 and from the Judgment entered on that Order on May 7, 1991. That Order and Judgment granted Edison's motion for summary judgment and denied BMI's cross-motion for summary judgment. BMI filed a timely Notice of Appeal on May 1, 1991, and a Supplemental Notice of Appeal on May 24, 1991. The Eighth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 and 1294.

ARGUMENT

Introduction

BMI submits that the decision of the Eighth Circuit in this case was wrongly decided for a number of independent reasons, and BMI urges this Court to review that decision. The Eighth Circuit's decision has also created a clear split in the

interpretation of federal copyright law between a number of federal courts, and BMI urges this Court to review the decision of the Eighth Circuit in order to restore uniformity to the application of the Copyright Act.

Federal copyright law provides that the owner of a copyrighted musical composition has the exclusive right to license public performances of his or her composition. The result is that any business establishment open to the general public which plays music (whether by tape, compact disc, radio, or otherwise) must obtain permission from the copyright owner covering such use. Failure to obtain the required permission renders any public performance of the music an act of copyright infringement.

Edison claims, and the lower courts agreed, that it is entitled to invoke the Section 110(5) small business exemption of the Copyright Act, and therefore does not need licenses for its 2,000 unlicensed stores and is free to use copyrighted music without paying any compensation to the creators and publishers of that music. The Section 110(5) exemption provides that businesses using a single home-style receiving apparatus are exempt from copyright liability.

BMI maintains that the Section 110(5) exemption does not apply to Edison for four independent reasons. First, Edison is operating not one unlicensed receiving apparatus (as permitted by the terms of the statute), but more than 2,000, with more than 55 in a single city. Thus, Edison does not qualify for the Section 110(5) exemption under the plain language of the statute. Second, 95% of Edison's unlicensed stores have greater square footage than the maximum permitted under the test set forth by other courts and consistent with the Congressional history of the exemption. Third, with 17,000 employees, 2,500 substantial retail stores, and a billion dollars a year in revenues, Edison's stores are clearly of sufficient size to justify, as a practical matter, a subscription to a commercial background music service and Edison can equally clearly afford to pay normal public performing licensing fees. Based on the legislative history of the Copyright Act, all courts which examined this statute from its effective date through 1990 have held that such an ability to pay for the use of music precludes a claim of entitlement to the Section

110(5) exemption. And fourth, the circuit and district courts' expansion of the Section 110(5) to cover Edison results in an important change in U.S. copyright law as it existed on the date that the United States became a party to the Berne Convention, and places the United States in conflict with its obligations under the international copyright treaty known as the Berne Convention.

BMI respectfully requests that this Court grant a writ of certiorari to review the decision of the Eighth Circuit in this case for the following independent reasons: (1) to resolve the split in the interpretation of Section 110(5) between the rulings of the Eighth and Seventh Circuits, on the one hand, and the rulings of the Second and Ninth Circuits and the District Courts of California, Maine, Montana, New Hampshire, New York, Ohio, North Carolina, Pennsylvania, Texas, Virginia, and Utah, on the other hand; (2) to restore a uniform application of the federal copyright law, such that creators of copyrighted musical compositions are compensated equally for the use of their copyrights in all parts of the country, and so that individuals and businesses which make use of copyrighted musical compositions on a nationwide basis can know with certainty that their use of such works will be treated equally in all parts of the country; (3) to restore full compliance with the international treaty obligations of the United States under the Berne Convention, as it existed prior to the decision of the Eighth Circuit in this case; and (4) to restore and enforce the plain meaning of the Section 110(5) exemption, in full accord with the Congressional intent clearly expressed in connection with the drafting and enactment of that exemption.

I. The Lack of A Uniform Copyright Law Following the Decision of The Eighth Circuit

Beginning on January 1, 1978—the effective date of the 1976 Copyright Act—and continuing through an unbroken string of case law precedent up to the decision of the lower courts in this case and the *Claire's* case in the Seventh Circuit, the rule has been that performances of music in public places, except by a small business of limited means that oper-

ates a simple radio receiver, are not exempt from the copyright owner's right to compensation for the exploitation of his or her creative work. The decision of the Eighth Circuit not only rejects both the plain meaning of the Copyright Act, as well as Congress' clearly expressed intent in enacting that provision, but places this circuit (along with the Seventh Circuit) in conflict with other circuit and district courts.

A. The Law Prior to the 1976 Copyright Act

No provision of the 1909 Copyright Act (the predecessor to the current Copyright Act) addressed the question of whether the playing of music through radio speakers constituted a "performance" which needed to be licensed. In 1975, in a case decided under the 1909 Copyright Act, this Court ruled that when the owner of a restaurant played music from a radio, it did not constitute a public performance. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

The restaurant was a small fast-service chicken restaurant known as "George Aiken's Chicken," located in downtown Pittsburgh, Pennsylvania. The restaurant consisted of 1,055 square feet of total leased space, with 620 square feet open to the public.[4] The Supreme Court described George Aiken's use of music as follows: "Aiken usually turns on the radio each morning at the start of business. Music, news, entertainment, and commercial advertising broadcast by radio stations are thus heard by Aiken, his employees, and his customers during the hours that the establishment is open for business." *Id.* at 152.[5] Although the district court noted that Mr. Aiken operated more than one restaurant, the litigation and the

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4 The square footage of George Aiken's store was not specified in the *Aiken* decisions, but has been clearly established in subsequent cases. *See, e.g., Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923, 924 (S.D.N.Y.), *aff'd per curiam*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982); *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 657 (N.D. Ill. 1987), *aff'd*, 855 F.2d 375 (7th Cir. 1988).

5 In a concurring opinion, Justice Blackmun noted that "as [George Aiken] operated his small food shop and served his customers, he heard the broadcasts himself." *Id.* at 164.

court's holding involved only one of his stores, and there is no indication in any reported decision that he was using music in any of his other stores.

B. The Enactment of the 1976 Copyright Act

When Congress enacted the 1976 Copyright Act, it specifically overturned the holding of *Aiken* that playing music from a radio was not a public performance. Unlike the 1909 Copyright Act, there was no ambiguity in the new Act: the Section 101 definition of "public performance" made it clear that the playing of music in an establishment which is open to the general public constitutes a public performance, regardless of the source of that music. H.R. Rep. No. 1476, 94th Cong., 2d Sess., pg. 87, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659 (House Report on the 1976 Copyright Act, stating that the *Aiken* case "is completely overturned by the present bill and its broad definition of 'perform' in section 101."). *See Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923, 924 (S.D.N.Y. 1981); *see also* Nimmer Declaration ¶ 25, A-526-527.

Although in the 1976 Copyright Act Congress did determine that playing a radio in public was public performance, Congress did provide in Section 110(5) an *Aiken*-style exemption for small businesses from the obligation to pay licensing fees for the use of music derived from a single inexpensive home-style radio. *See National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 730 (8th Cir. 1986) ("The home-use exemption [Section 110(5)] was included in the 1976 Copyright Act specifically in response to the Supreme Court's decision in [*Aiken*]"). The exemption was intended to be an extremely limited one, designed to apply only to the *Aiken* fact pattern. According to the Report of the Senate/House Conference Committee, Congress intended the *Aiken* "fact situation to represent the outer limit of the exemption . . . the line should be drawn at that point." H.R. Rep. No. 1476, 94th Cong., 2d Sess., pg. 87, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659. *See* Nimmer Declaration ¶ 26, A-527-528. Congress was obviously trying to balance two equities—protection for the copyright owner without placing an undue burden on small mom-and-pop businesses.

The intent to limit the exemption to small businesses, such as the one run by George Aiken, is clear. The Conference Report states that: "It is the intent of the conferees that *a small establishment*" be exempt from the obligation to pay royalties, and specifically notes that a business which is of "sufficient size to justify, as a practical matter, a subscription to a commercial background music service" would not be exempt. H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. at 75, *reprinted in* U.S. Code Cong. & Admin. News 5810 (emphasis added). The House Report refers to "a *small commercial establishment*" and states that the exemption "would exempt *small commercial establishments* whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment . . . ." H.R. Rep. No. 1476, 94th Cong., 2d Sess., pg. 87, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659 (emphasis added). The relevant portions of the House Report and the House/Senate Conference Committee Reports are reproduced in Appendix E hereto.

C. Interpretation of Section 110(5) By The Courts From 1978 through 1989

Virtually every court that has examined the applicability of the Section 110(5) exemption since its enactment in 1976 held the *Aiken* fact pattern to be the outer limit of the exemption, and precluded businesses which exceed those specific parameters from invoking the exemption. The *Aiken* fact pattern consisted of the following elements: (1) use of only a single receiver; (2) the receiver must be "home-style"; (3) the business establishment must not be larger than 1,055 total square feet with not more than 625 square feet open to the public; and (4) the business must not have the ability to pay for its use of music or be of sufficient size to justify, as a practical matter, a subscription to a commercial background music service.

(1) Requirement of a single receiver:

Section 110(5) states that the exemption applies only to one who communicates a performance on a "single receiving apparatus of a kind commonly used in private homes." Vir-

tually every case involving the Section 110(5) exemption has made reference to this requirement. *See, e.g., Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923, 924 (S.D.N.Y.), *aff'd per curiam*, 668 F.2d 84, 86 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982); *Broadcast Music, Inc. v. United States Shoe Corporation*, 678 F.2d 816, 817 (9th Cir. 1982). However, both the instant case and *Claire's* were the first to focus on the meaning of "single receiving apparatus."

(2) Requirement that the receiving apparatus be "home-style":

Again virtually every case involving the Section 110(5) exemption has made reference to the requirement that the receiving apparatus be "home-style". Edison does not contest the existence of this requirement, and for the purposes of this litigation BMI is not contesting that each separate receiver used by Edison, if considered separately, and without reference to the size of the area in which it is located, is indeed "home-style."

(3) Requirement that the business establishment may not be larger than 1,055 total square feet, with not more than 625 square feet open to the public:

As with the two previous requirements, virtually every case decided in the 16 years since the enactment of the 1976 Copyright Act has ruled that the *Aiken* square footage is the maximum square footage that a store may have if it is seeking to invoke the Section 110(5) exemption.

In 1981, the United States Court of Appeals for the Second Circuit ruled, in a case involving a claim to the Section 110(5) exemption by The Gap stores, that The Gap was not entitled to invoke Section 110(5) because of the size of its stores. Both the district court and the Second Circuit predicated the denial of the exemption solely on the defendant's size and the defendant's ability to afford a commercial background music service. *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y.), *aff'd*, 668 F.2d 84 (2d Cir. 1981); *cert.*

denied, 456 U.S. 945 (1982).[6] In 1982, the Ninth Circuit also noted the square footage of George Aiken's establishment, and held that the *Aiken* case represents the outer limit of the Section 110(5) exemption. *Broadcast Music, Inc. v. United States Shoe Corporation*, 678 F.2d 816, 817 (9th Cir. 1982).

District courts which considered this issue reached the same conclusion: stores which exceed the *Aiken* square footage cannot rely on the Section 110(5) exemption to avoid paying normal music use fees. The District Court for the Eastern District of Virginia, in denying a claim of exemption under Section 110(5), has held that "Courts have been unwilling to apply the exemption where the physical size of the public space in which communication of the copyrighted material occurred is larger than that in *Aiken*. . . . Within this framework, the actions of [defendant] must be said to exceed the 'outer limits' of the exemption." *Broadcast Music, Inc. v. Jeep Sales & Service Co.*, 747 F. Supp. 1190, 1193 (E.D. Va. 1990). The Western District of Texas denied application of the Section 110(5) exemption where "[t]he restaurant itself

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6 The Gap Stores, Inc., which operated 420 retail clothing stores, was sued for acts of copyright infringement based on the use of music from a radio at two specific stores. The district court found:

> [T]here is a factual dispute between the parties' experts as to whether or not the particular components used in these two Gap stores are actually "commonly used in private homes," and consequently the court cannot grant summary judgment on this basis.

516 F. Supp. at 925. The court nonetheless held that The Gap did not qualify for the Section 110(5) exemption and entered summary judgment against it, on the grounds that the physical size of the two Gap Stores at issue were too large to qualify for the Section 110(5) exemption. On appeal, the Second Circuit upheld the district court's determination:

> [T]he Gap store in the instant case exceeds this outer limit [*Aiken*] as Judge Gagliardi properly held. It is much larger than the shop in Aiken which, as Judge Gagliardi concluded, indicates that Congress did not intend it to be exempted from the mandates of the copyright laws pursuant to section 110(5). Furthermore, the store is of sufficient size to justify, as a practical matter a subscription to a commercial background music service.

668 F.2d at 68. Neither the district court nor the Second Circuit based their decisions on the type of equipment found in the Gap stores. Certiorari to the United States Supreme Court was denied.

is of no small proportion, boasting some 7000 square feet of dining area. . . . Thus, this Court does not hesitate to find the facts above do not fit within the exception carved out under 17 U.S.C. § 110(5)." *Crabshaw Music v. K-Bob's of El Paso, Inc.*, 744 F. Supp. 763, 767 (W.D. Tex. 1990). In an earlier case, that same court denied a defendant's attempt to invoke the Section 110(5) exemption, stressing that defendant's restaurants had "1000 to 1500 square feet of public dining area." *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172, 1176 (W.D. Tex. 1988). The District Court for Montana denied application of the exemption where defendants' gross square footage was 1,192, "far exceeding *Aiken's* 'outer limit.' " The court held that, "[o]n this basis alone, defendants have failed to show their restaurant is a 'small commercial establishment' as contemplated by the § 110(5) exemption." *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1039 (D. Mont. 1990). The District Court for Maine relied on the *Aiken* square footage limitation as one of three reasons the exemption was inapplicable, holding that "[t]he defendant's restaurant is not a small commercial establishment of the kind which qualifies for § 110(5) exemption protection. With 1,824 square feet of space open to the public, the defendant's restaurant contains almost three times the public square footage of the fast food store in *Aiken*." *Gnossos Music v. Quido DiPompo*, 1989 Copyright L. Rep. (CCH) ¶ 26,483, at 22,937, 13 U.S.P.Q. 1539 (D. Me. 1989). The District Court for New Hampshire held, as a separate and independent ground for denying the exemption, that "the size of defendants' Milford store precludes Section 110(5) applicability. With 13,000 square feet of floor space open to the public, the Milford store is nearly twenty-one times larger than the fast-food shop at issue in *Aiken*, well beyond the 'outer limit' of the Section 110(5) exemption." *Merrill v. Country Stores, Inc.*, 669 F. Supp. 1164, 1170 (D.N.H. 1987). In denying a defense based on the Section 110(5) exemption, the District Court for the Northern District of Ohio noted that the "defendant stores range between 10,000 to 18,500 square feet open to the public." *Little Mole Music v. Mavar's Supermarket*, 12 U.S.P.Q.2d 1209, 1214 (N.D. Ohio 1989). In denying a defendant's claim of exemp-

tion under Section 110(5), the District Court for the Northern District of California observed that the square footage of defendant's stores varied from 10,000 to 15,000 square feet. *Lamminations Music v. P&K Markets, Inc.*, 1985 Copyright L. Dec. (CCH) ¶ 25,790, at 19,556 (N.D. Ca. 1985). The District Court for Pennsylvania denied a claim of exemption where the defendants' stores all exceeded 10,000 square feet. *Rogers v. Eighty Four Lumber Company*, 617 F. Supp. 1021 (D.C. Pa. 1985). Citing *Aiken*, the District Court for Utah denied the exemption where the defendant's operations covered 2,000 to 3,000 square feet. *St. Nicholas Music, Inc. v. D.V.W., Inc. and David Van Wagenen*, 1985 WESTLAW 9624 (D. Utah 1985).[7]

Prior to the decisions in this case and in *Claire's*, only one court permitted a retail establishment with more square footage than that of *Aiken* to claim the small business exemption.[8] In *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113, 1115, 1116, 1117 (M.D.N.C. 1985), however, the establishment at issue was an outdoor miniature golf course which was open only six months per year, rarely if ever generated revenues of more than $1,000 per month, and played music that was "scarcely audible without distortion even at very close proximity to the speakers." *Id.* at 1118. The court also noted, "The courts in the *Gap* and *U.S. Shoe* cases held that operations with 420 and 600 prosperous retail outlets, respectively, both of which did hundreds of millions of dol-

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7 In a number of the cases cited above, the court also held that the equipment used by the defendant was not "home-style" equipment; however, in virtually every case the excessive square footage of the defendant's store was stated by the court to be an independent reason for disqualifying the defendant from invoking the Section 110(5) exemption.

8 Even in the *Claire's* case, however, the court found that the size of the individual stores is relevant in determining whether the home-style exemption applies; the court noted that in interpreting what constituted "home type" equipment, a term that is not defined in the statute, "it is apparent that Congress intended the exemption to apply only to stereo systems that produce music over a limited area." *Claire's*, 949 F.2d at 1493. Since 631 out of 749 of the Claire's stores were smaller than the store in *Aiken*, the *Claire's* court determined that Claire's was still entitled to the exemption. *Id.* at 1494. As stated previously, 95% of Edison's stores exceed the *Aiken* square footage. (A-560).

lars of business annually, were not within the purview of the Section 110(5) exemption. This court does not contest the soundness of those opinions." *Id.* at 1118.

(4) Requirement that the business must not have the ability to pay for its use of music or be of sufficient size to justify, as a practical matter, a subscription to a commercial background music service:

On this final requirement, virtually every case decided since the enactment of the 1976 Copyright Act has ruled that a business seeking to invoke the Section 110(5) exemption must not have the ability to pay for its use of music and must not be of sufficient size to justify, as a practical matter, a subscription to a commercial background music service.[9]

The Second and Ninth Circuits have both issued rulings to this effect. The Second Circuit, in the *Gap* case discussed in the preceding section, held that The Gap Stores, Inc. was not entitled to invoke Section 110(5) because "the store is 'of sufficient size to justify, as a practical matter, a subscription to a commercial background music service.' " *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 86 (2d Cir. 1981) (citing to the legislative history, at H. Rep. No. 1733, 94th Cong. 2d Sess., 75 (1976)), *cert. denied*, 456 U.S. 945 (1982). The Ninth Circuit, in the *United States Shoe* case, also based its decision on the ability of the defendant to afford a background music service, ruling that "the size and nature of the operation justifies the use of a commercial background service." *Broadcast Music, Inc. v. United States Shoe Corporation*, 678 F.2d 816, 817 (9th Cir. 1982).

Every district court, with the exception of the district courts in this case and the *Claire's* court, that considered the issue of ability to pay reached the same conclusion: a business which is financially able to pay normal copyright licens-

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9 Indeed in a previous decision, the Eighth Circuit itself noted that "[i]n this sort of case [music over radios], the question as a practical matter is whether the defendant establishment is of the size and kind that Congress would expect to obtain a license through a subscription music service." *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731 (8th Cir. 1986).

ing fees should not be exempt from the obligation to pay those fees. For example, the District Court for the Western District of Texas has held that "it is clearly 'practical' for a chain of restaurants . . . grossing well over $500,000 annually to subscribe to a commercial background music service," and that "[d]efendants' prior subscription to a commercial background music service further establishes the inapplicability of the exemption to defendants' performances of copyrighted musical compositions." *Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172, 1176 (W.D. Tex. 1988). In a more recent case from that same court, a defendant's claim to the Section 110(5) exemption was rejected because the defendant's "restaurant itself is of no small proportion, boasting some 7,000 square feet of dining area and grossing between $800,000.00 and $900,000.00 in revenues annually. . . . Thus, this Court does not hesitate to find the facts above do not fit within the exception carved out under 17 U.S.C. § 110(5)." *Crabshaw Music v. K-Bob's of El Paso, Inc.*, 744 F. Supp. 763, 767 (W.D. Tex. 1990). The District Court for Montana has observed that whether the defendant's business qualifies as a "small commercial establishment" depends on the revenues of the business. "In the instant case, defendants have failed to disclose the revenues of their establishment—a puzzling omission, given defendants' burden of proving they fall within the 'home-style' exemption. This information would be useful to the court's inquiry because it would permit the Court to judge whether subscription to a background music service could be justified 'as a practical matter.' " *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1038 (D. Mont. 1990). The District Court for New Hampshire has held that the Section 110(5) exemption was not applicable because "defendants' $2.5 million in annual retail sales justifies subscription to a commercial background music system." *Merrill v. Country Stores, Inc.*, 669 F. Supp. 1164, 1170 (D.N.H. 1987). The District Court for the Middle District of North Carolina agreed that any establishment large enough to be a potential customer of a background music service is not covered by the Section 110(5) small business exemption. *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113, 1119 (M.D.N.C.

1985). The District Court for the Northern District of California denied an attempt to invoke the Section 110(5) exemption because the defendant's stores were "of sufficient size to warrant use of a commercial background music system—a fact confirmed by defendants' testimony that they employ such a service at two of the [stores]." *Lamminations Music v. P&X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) ¶ 25,790, at 19,556 (N.D. Ca. 1985). *See also* Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L.S. L. Rev. 521, 534 (1977) (the small business exemption is "a very limited exemption which . . . require[s] any establishment large enough to be a potential customer of a background music service to obtain a license if it chooses to perform music broadcast by any radio station.").

D. Passage of the Berne Implementation Act and Congressional Ratification of the Berne Convention

Effective March 1, 1989, the United States became a party to the international copyright treaty known as the Berne Convention. Article 36(2) of the Berne Convention provides that "at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention"; and Article 36(1) provides that each party to the Berne Convention shall "adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention."

The Berne Convention grants authors of copyrighted works the exclusive right to authorize the "public communication by loudspeaker or any other analogous instrument transmitting by signs, sounds, or images, the broadcast of the work." Article 11 *bis* (1)(iii). This includes the transmission of copyrighted musical works by radios. (Nimmer Declaration ¶¶ 12-17, A-520-523.) This same Article further provides that the author is entitled to equitable remuneration for such public communication of his work. *Id.*

In order to bring U.S. copyright law into conformity with the Berne Convention, Congress passed the Berne Convention Implementation Act, 102 Stat. 2853 (1988) (the "BCIA"). The BCIA provides that:

> The amendments made by this Act, together with the law *as it exists on the date of the enactment of this Act* satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

BCIA, § 2(3) (emphasis added). By its enactment of the BCIA, Congress expressed its intent that the provisions of the U.S. Copyright Act should not be read to conflict with U.S. obligations as a party to the Berne Convention. *See* BCIA, §§ 2(3), 3(a)(1).

The state of the law regarding Section 110(5), as it existed at the time Congress enacted the BCIA, was in material compliance with the requirements of the Berne Convention. At that time, the exemption was limited to small businesses, with minimal square footage and an inability to pay normal copyright licensing fees, using a single receiving apparatus. But the decision of the Eighth Circuit has undone U.S. compliance with Berne, by expanding the formerly-narrow Section 110(5) exemption to cover a nationwide corporation with a billion dollars a year in earnings which uses copyrighted music at more than 2,000 locations coast-to-coast without paying any compensation to the creators of the copyrighted music. The authors of that music are thus denied compensation for the commercial use of their works, in direct conflict with the provisions of Article 11 *bis* (1)(iii). The new construction of U.S. copyright law thus creates a direct conflict, not only with the law of the other circuits, but also with the international treaty obligations of the United States and the intent of Congress in ratifying that treaty. *See* Nimmer Declaration ¶¶ 30-32, A-531-532.

E. The Decision of the Eighth Circuit

In a radical departure from all previous decisions and from clear Congressional intent, the Eighth Circuit, following the lead of the Seventh Circuit in *Claire's*, ruled that Section 110(5) is not limited either by the physical size of the store in which the music is being used, or by the ability of the user to afford a background music service or normal copyright licensing fees. The circuit court also arrived at an interpreta-

tion of the "single receiving apparatus" language of the exemption which permits a user to operate literally thousands of receiving apparatuses.

In rejecting the years of precedent establishing a limitation on the physical size of stores seeking to invoke the exemption, the circuit court stated that "none of the cases cited has any binding precedential force in this Circuit." *Edison*, slip op. at 9. The Court also attempted to distinguish the previously unbroken line of precedent by noting that:

> in none of these cases did the court base its decision solely on the square footage of the stores without considering the nature of the equipment, i.e., whether it was "home-style," nor did any of them declare that they would have reached the same result based only upon the square footage of the infringing stores.

Id. at 9. This point is somewhat misleading, because the converse is equally true: none of the courts declared that they would have reached the same result based solely upon the nature of the equipment. If the Eighth Circuit were correct that square footage was not relevant to any of the previous decisions, it would be difficult to understand why the other courts bothered to consider the square footage at all. In fact the Eighth Circuit is not correct: several courts made it clear that the square footage requirement is *independent* of, and in addition to, the requirement of home-style equipment. *See, e.g.*, *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 86 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) (denial of the exemption predicated *solely* on the defendant's size and the defendant's ability to afford a commercial background music service; type of radio equipment used by the defendant was not an element of the decision); *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1039 (D. Mont. 1990))

The circuit court similarly rejected years of consistent precedent limiting the application of the Section 110(5) exemption to businesses which do not have the ability to pay for their use of music or which are not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service. *Edison*, slip op. at 11-12. On this point, however, the court did not even acknowledge the exist-

ence of contrary precedent in other circuits and districts, and dismissed this limitation as though it were invented by BMI for purposes of this litigation.

In addition, the Eighth Circuit interpreted the "single receiving apparatus" language of Section 110(5) to mean "single per location" rather than "single per owner." The result is that Edison, which operates over 2,000 "home-style" radios on a nationwide basis, in many instances with multiple stores and receivers in the same mall, was found to have met the "single receiving apparatus" requirement of § 110(5).

F. The Current State of the Law

As a result of the decision of the Eighth Circuit in this case and the decision by the Seventh Cicuit in the *Claire's* case,[10] the United States no longer has a single national copyright law regarding the public performance of music via radios: (1) in the Eighth and Seventh Circuits the Section 110(5) exemption can be invoked by users of music, regardless of the square footage of their retail operations, while in the Second Circuit, the Ninth Circuit, and the Districts of California, Maine, Montana, New Hampshire, New York, Ohio, North Carolina, Pennsylvania, Texas, Virginia, and Utah the Section 110(5) exemption may not be invoked by users of music whose retail operations exceed the square footage of that in the *Aiken* case;[11] and (2) in the Eighth and Seventh Circuits the Section 110(5) exemption can be invoked even by users of music who are of sufficient means to justify a subscription to a commercial background music service, while in the Second Circuit, the Ninth Circuit, and the District Courts of California, Montana, New Hampshire, North Carolina, and Texas

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10 *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir. 1991). In that case the Seventh Circuit also concluded that Section 110(5) does not limit a business to the use of a single receiving apparatus, and that the size of the retail stores at issue and their ability to pay normal copyright licensing fees are not a factor in determining the applicability of Section 110(5).

11 *See* Appendix "G".

such an ability to pay for the use of music precludes a claim to the exemption.[12]

In addition, the change in U.S. copyright law which has resulted from these decisions has placed the United States in direct conflict with its international treaty obligations under the Berne Convention, by denying authors equitable remuneration for the public communication of their works.

II. Errors in the Decision of the Eighth Circuit

BMI respectfully requests that this Court grant the petition for a writ of certiorari so that the splintered interpretations of Section 110(5) can be resolved. BMI further urges this Court to review the decision of the Eighth Circuit in this case because of clear errors in that decision.

A. The Court Ignored The Plain Meaning of the Statute

The Section 110(5) exemption, by its terms, is limited to the use of "a single receiving apparatus of a kind commonly used in private homes." BMI maintains that "single" means exactly that: if an individual or corporation is using more than one receiver, it does not qualify for the Section 110(5) exemption. The circuit court rejected this interpretation, on the ground that "it defies the plain language of the statute." *Edison*, slip op. at 5.

Even if it were not clear that the language of subsection 110(5) limits the application of the exemption to the use of a single receiver, the language and statutory context of the rest of Section 110 confirms that subsection 110(5) should not be read to provide an exemption from the general provisions of the Copyright Act for multimillion dollar retail businesses operating multiple receivers. Section 110, as a whole, provides exceptions to the rule that users of copyrighted material must pay for the public performance of such material. Those exceptions are extended to a limited group of those who cannot pay or, for reasons of public policy, should not be required to pay. The Section 110 exceptions are limited to: teaching, governmental or non-profit educational institutions, performances in the course of services at places of worship or

12 *See* Appendix "H".

other religious assembly, non-profit educational, religious, or charitable purposes, agriculture or horticulture affairs or exhibits, performances for the purpose of selling the records on which the music is contained (i.e. the playing of music in record stores), performances directed to blind or other handicapped persons, and performances by veterans' organizations or non-profit fraternal organizations for charitable purposes.[13] A reading of Section 110(5) which would equate profit-making multimillion dollar retail businesses with educational, religious, and charitable users, and an interpretation of the "single receiver" language of Section 110(5) that permits the use by this same multimillion dollar business of an unlimited number of receivers on a nationwide basis makes no sense and is clearly at odds with both the plain language of the statute as well as the statutory context of Section 110(5).

In attempting to rationalize its expansion of the statutory language from a "single receiver" to an unlimited number of receivers, the circuit court stated that "[w]e think it obvious that the language refers to a single location." *Edison*, slip op. at 5. The court argued that the language of the statute thus strongly suggests that the proper analysis should be limited to the area where a single work is performed. *Id.* This "single per location" interpretation of the statute ignores the language of the statute as drafted by Congress, and simultaneously opens a whole new realm of uncertainty: what is a location? Nowhere in the statute, in the Copyright Act, or in the legislative history is there any definition of the term "location." Does "single per location" permit the use of multiple radios in the same city (Edison operates scores of "single" radios in certain cities)? Does it permit the use of multiple radios in the same shopping mall (Edison operates multiple stores and radios in virtually every mall in which it does business)? Does it permit the use of multiple radios in different areas of the same store (for example on different floors, or in the sales area and the stock room)? Or does it merely prohibit the unlikely use of multiple receivers placed side-by-side (certainly not the problem that Congress was

13 17 U.S.C. § 110(1-4), (6-10).

seeking to redress when it enacted Section 110(5)). By straying from a strict construction of the plain meaning of the statute, the circuit court has created brand new problems of interpretation and application; problems that cannot be resolved by reference to any other provision of the Copyright Act.

B. The Court Ignored Congressional Intent Regarding the Proper Interpretation of Section 110(5)

If there is any ambiguity as to what Congress intended by the use of the words "single receiving apparatus," examination of the legislative history of Section 110(5) makes it abundantly clear that Congress meant "per-user," and not a "per-location" analysis which would allow a single user to make use of an unlimited number of receiving apparatuses.

The House Report on the 1976 Copyright Act states that the exemption is intended to "exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment. . . ." H.R. Rep. No. 1476, 94th Cong., 2d Sess., pg. 87, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659. Nothing could be further from this stated intent than the circuit court's reinterpretation of the statute that allows a multimillion dollar nationwide business of thousands of commercial establishments to purchase an unlimited number of radios at bulk prices and install them according to a systematic detailed business plan.

Certainly nothing could be further from the facts of the *Aiken* case, which involved a single radio in a small proprietor-owned business, where the owner, George Aiken, personally "usually turn[ed] on the radio each morning at the start of business," and where the music was heard "*by Aiken*, his employees, and his customers." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 152, 164 (1975) (emphasis added). There is no Mr. Edison turning on 2,000 radios each morning and listening to the music on those radios. As noted earlier in the discussion of the history of the statute, Congress intended the *Aiken* "fact situation to represent the outer limit of the exemption . . . the line should be

drawn at that point." H.R. Rep. No. 1476, 94th Cong., 2d Sess., pg. 87, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659. By extending the Section 110(5) exemption far beyond the bounds of the *Aiken* confines, the circuit court has ignored clear congressional intent demonstrating that, to the extent the term "single receiving apparatus" is ambiguous, it should be construed narrowly and not in a manner that permits the use of an unlimited number of receivers.

C. The Court Ignored or Rejected All Prior Precedent

In reaching its holding, the circuit court either ignored or rejected all prior precedent. On the issue of whether application of the exemption is limited to stores with minimal square footage, the court acknowledged the existence of 13 years of consistent precedent, but stated that "none of the cases cited has any binding precedential force in this Circuit." *Edison*, slip op. at 9. The court attempted to minimize its departure from precedent by arguing that none of the prior cases were based squarely on the failure to comply with the limitation on square footage. *Id.* This is a meaningless distinction, since all of the cases involved failure to comply with more than one requirement of the exemption. Several courts, in fact, have made it clear that the square footage requirement is independent of any other requirement of the exemption. *See, e.g., Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84, 86 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982). *Merrill v. Country Stores, Inc.*, 669 F. Supp. 1164 (D.N.H. 1987).

On the issue of whether the application of the statute is limited to businesses which do not have the ability to pay for their use of music or which are not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, the circuit court simply ignored precedent. In its briefs to the circuit court, BMI cited at least eight cases (including opinions of the Second and Ninth Circuits) which based a denial of the Section 110(5) exemption on the ground that the businesses had the ability to pay for their use of music.[14] The circuit court did not cite any of

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14 See Appendix H. *See also* Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L.S. L. Rev.

these cases in its opinion, and made no effort to distinguish or rebut the holdings of those courts.

D. The Court Ignored the Impact of the Berne Implementation Act and Congressional Ratification of the Berne Convention

The circuit court rejected BMI's argument that the ruling of the district court placed the United States in violation of its obligations under the Berne Convention on the ground that "the District Court's interpretation of section 110(5) does not expand the home-style exemption, but merely declares that the statutory language means what it says." *Edison*, slip op. at 14. This is not true. The district court for the first time eliminated the requirements of minimal square footage and ability to afford music licensing fees, and interpreted the "single receiver" language of the statute to allow the use of 2,000 "single" receivers. Prior to the district court's novel re-interpretation of the law a nationwide business of retail stores with substantial square footage, a billion dollars in annual revenues, and over 2,000 unlicensed radios would not have been entitled to invoke the exemption; based on the district court's re-interpretation such a business is permitted to invoke the exemption. There is no question but that the circuit court's holding expanded the scope of the Section 110(5) exemption.

The circuit court also noted that "Congress was emphatic that the United States' participation in the Berne Convention should not give rise to an *expanded* claim of copyright protection." *Edison*, slip op. at 14. BMI is not, however, contending that the Berne Convention changed the state of U.S. copyright law; rather it contends that in light of U.S. adherence to the Berne Convention, courts should not expand the narrow confines of the Section 110(5) exemption as it existed at the time of U.S. adherence to Berne in such a manner as

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521, 534 (1977) (the small business exemption is "a very limited exemption which . . . require[s] any establishment large enough to be a potential customer of a background music service to obtain a license if it chooses to perform music broadcast by any radio station.")

to create a conflict with U.S. obligations under the Convention. Indeed, in enacting the BCIA, Congress specifically stated that "[t]he amendments made by this Act, together with the law *as it exists on the date of the enactment of this Act* satisfy the obligations of the United States in adhering to the Berne Convention. . . ." BCIA, § 2(3) (emphasis added).

When Congress passed the BCIA, Congress presumably was aware of the manner in which the courts had consistently applied the Section 110(5) exemption (*i.e.*, the exemption was restricted to small business establishments unsuitable for commercial music services using only a single radio receiver).[15] The district court's subsequent extension of the exemption from its traditional limitation to small businesses using a single receiver to encompass Edison, a nationwide business with a billion dollars a year in revenues operating more than 2,000 radios, modifies U.S. copyright law in a manner which is contrary to U.S. obligations under the Berne Convention and contrary to the intent of Congress in passing the BCIA and ratifying Berne.

III. Reasons for Granting the Writ of Certiorari

BMI respectfully requests that this Court grant a writ of certiorari to review the decision of the Eighth Circuit in this case for the following independent reasons:

First, to resolve the differences in the interpretation of Section 110(5) between (i) the rulings of the Eighth and Seventh Circuits and (ii) the rulings of the Second and Ninth Circuits and the District Courts of California, Maine, Montana, New Hampshire, New York, Ohio, North Carolina, Pennsylvania, Texas, Virginia, and Utah.

Second, to restore a uniform application of the federal copyright law, such that creators of copyrighted musical com-

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15 It is a well-settled principle that Congress is presumed to be knowledgeable about existing law pertinent to the legislation it enacts. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *Director, Office of Workers' Compensation v. Perini North River Associates*, 459 U.S. 297, 319 (1983); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271, 275 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962).

positions are compensated equally for the use of their copyrights in all parts of the country, and so that individuals and businesses which make use of copyrighted musical compositions on a nationwide basis can know with certainty that their use of such works will be treated equally in all parts of the country.

Third, to restore full compliance with the international treaty obligations of the United States under the Berne Convention, as it existed prior to the decision of the Eighth Circuit in this case.

And fourth, to restore and enforce the plain meaning of the Section 110(5) exemption, in full accord with the Congressional intent clearly expressed in connection with the drafting and enactment of that exemption.

CONCLUSION

For the reasons set forth in this Petition, BMI respectfully requests that this Court issue a writ of certiorari for a review of the decision of the United States Court of Appeals for the Eighth Circuit in this case.

Dated: March 10, 1992

Respectfully submitted:

Jonathan Zavin, Esq.
Counsel of Record
Edward L. Powers, Esq.
RICHARDS & O'NEIL
885 Third Avenue
New York, New York 10022
212/207-1200

—WITH—

Judith Saffer, Esq.
BROADCAST MUSIC, INC.
320 West 57th Street
New York, New York 10019
212/586-2000

Scott M. Martin, Esq.
OF COUNSEL
5555 Melrose Avenue
Los Angeles, California 90038
213/956-5000

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2115

Submitted: November 7, 1991
Filed: January 13, 1992

EDISON BROTHERS STORES, INC.,

Appellee,

—v.—

BROADCAST MUSIC, INC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Before

MCMILLIAN, JOHN R. GIBSON, and BOWMAN,
Circuit Judges.

BOWMAN, *Circuit Judge*.

Broadcast Music, Inc. (BMI), appeals the District Court's[1] decision to grant summary judgment in favor of Edison Brothers Stores, Inc., in Edison's suit for a declaratory judgment that its stores qualify for an exemption from the vesting of exclusive rights of performance in the owners of copy-

1 The Honorable John F. Nangle, Senior United States District Judge for the Eastern District of Missouri.

righted works. *See Edison Bros. Stores, Inc. v. Broadcast Music, Inc.*, 760 F. Supp. 767 (E.D. Mo. 1991). We affirm.[2]

The relevant facts are not in dispute. BMI is a performing rights organization that collectively licenses, as assignee of the rights of its copyright-holding clients (primarily publishers and songwriters), the public performance of such clients' copyrighted works.

Edison owns a chain of approximately 2500 retail clothing and shoe stores doing business as Chandlers, Jeans West, Fashion Conspiracy, Size 5-7-9 Shops, J. Riggins, Bakers, the Wild Pair, and others. Most of Edison's stores operate a single radio receiver with two attached shelf speakers to play radio broadcasts in the stores for the enjoyment of employees and customers. The equipment is simple and inexpensive. Edison has promulgated a radio usage policy and requires the adherence of these stores to the rules therein. The District Court summarized the policy as follows:

1. Only simple, low grade radio-only receivers are to be used.
2. Only two speakers may be attached to a radio receiver.
3. The speakers must be placed within 15 feet of the receiver.
4. Speakers that are built into the walls or ceilings must not be used. Only portable box speakers are allowed.
5. [Edison will a]dvise each store manager that they are not to use tapes, cassettes, or any other type of recording equipment in their stores. They are to play the radio only.

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2 In its complaint, Edison also claimed that BMI was equitably estopped from attempting to collect license fees because of the prior dealings of the parties. Complaint at ¶ 19, *reprinted in* Joint Appendix A-7, A-13. The District Court did not reach this issue. Edison asks this Court to remand for consideration of the estoppel issue should we reverse the decision of the District Court. Because we are affirming that decision, a remand is unnecessary.

Edison Bros. Stores, 760 F. Supp. at 769-70, *quoted in* Brief of Appellee at 7. BMI has submitted no evidence that any of the Edison stores to which the radio usage policy applies have failed to comply with it.

Approximately 220 of Edison's stores have more sophisticated audio and video systems or subscribe to commercial music services. Edison pays license fees to BMI or to commercial services licensed by BMI or other performing rights organizations for the music played in these stores. In recent years BMI approached Edison about licensing the remaining stores in its chain. Negotiations between the two parties evidently broke down, and Edison filed suit in District Court seeking declaratory relief. The court, agreeing with Edison's position, declared that the radio systems in use at Edison's unlicensed stores qualified for the so-called homestyle exemption to the exclusive performance rights that copyright owners enjoy under federal law. BMI appeals.

In reviewing on appeal a district court's decision to grant summary judgment, we are governed by the same standard that governed the court below. *McCuen v. Polk County, Iowa*, 893 F.2d 172, 173 (8th Cir. 1990). We therefore will affirm the District Court unless we find there remain genuine issues of material fact, in which case a trial would be required, or that the District Court erred in deciding that Edison was entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). BMI and Edison both filed motions for summary judgment and thus apparently agree there are no disputed issues of material fact. Therefore we are left with a purely legal question involving interpretation of the Copyright Act.

I.

Under the Copyright Act, the owner of the copyright of a musical work has the exclusive right, among other rights, to perform the copyrighted work publicly. 17 U.S.C.A. § 106(4) (West Supp. 1991). The Act, however, provides exemptions for certain performances. 17 U.S.C. § 110 (1988). Among the

acts that are not "infringements of copyright" is the following:

> communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> > (A) a direct charge is made to see or hear the transmission; or
> >
> > (B) the transmission thus received is further transmitted to the public[.]

Id. § 110(5). The issue before the District Court, and now before us, is whether Edison's 2000-plus radio receivers, each with two attached speakers and each operated in a different store, qualify for this homestyle exemption. BMI insists that, for several reasons, the exemption is unavailable to Edison.

Clearly, each radio in an Edison store is a "single receiving apparatus" and is "communicat[ing] . . . a transmission embodying a performance . . . of a work by the public reception of the transmission." The receivers in the Edison stores are tuned to local radio stations and play anything and everything, including musical works, that the radio stations broadcast while the stores' receivers are on. No "direct charge is made to see or hear the transmission," and there is no contention that the broadcast is "further transmitted to the public" beyond the stores.

The sticking point for the parties, and the basis for BMI's first argument, is Edison's multiple locations, each employing a single receiver and two speakers in conformity with the company's radio usage policy. BMI argues that the statutory requirement that the transmission be received "on a single receiving apparatus of a kind commonly used in private homes" is not satisfied by this arrangement; although BMI concedes that an individual receiver and speaker set-up in one store may fit within the exemption, it takes the position that Edison lost section 110(5) protection as soon as it installed the second receiving apparatus in another of its stores. BMI contends that the statute requires that we consider the equip-

ment of any one owner *in toto*, and not on a per-store basis, when we decide whether or not the exemption applies and find (as of course we would if we did as BMI suggests) that Edison is not in fact operating a "single receiving apparatus" within the meaning of the statute.

We cannot accept BMI's interpretation of section 110(5), as it defies the plain language of the statute. Section 110(5) does not say that a person, company, or other entity must own or operate only a single receiver to qualify for the exemption; it refers to "the communication of *a* transmission embodying *a* performance . . . of *a* work" (emphasis added). We think it obvious that the language refers to a single location. "The statute does not ask how many receiving apparatuses were used to receive a number of different works. The language of the statute thus strongly suggests that the proper analysis should be limited to the area where a single work is performed." *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, No. 91-1232, slip op. at 14 (7th Cir. Dec. 11, 1991).[3] If we were to embrace BMI's argument and reach the result it suggests, the equipment used in any Edison store, including those stores that have more sophisticated equipment, would be attributable to each of the other stores owned by Edison for purposes of the Copyright Act. Such a result does not comport with the statutory language.

We agree with the District Court "that it is not appropriate to focus on the number of stores involved, but rather on whether each store duplicates the requirements of the home-style exception." *Edison Bros. Stores*, 760 F. Supp. at 770. There is no evidence in the record that any of Edison's unlicensed stores fail to meet the statutory criteria for entitlement to the section 110(5) exemption.

BMI claims that the legislative history of the exemption supports its multiple receiver argument. Our reading of the legislative history reveals nothing that convinces us that each

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3 In *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, No. 91-1232, slip op. (7th Cir. Dec. 11, 1991), the Seventh Circuit considered some of the same issues now before us and reached a result consistent with our decision today.

store in a retail chain should not be considered for the homestyle exemption individually, as seems plain from the straightforward language of section 110(5). We certainly will not use the legislative history to which BMI directs our attention as a basis for reading into the statute limitations its language does not express. *See Union Bank v. Wolas*, 60 U.S.L.W. 4043, 4044 (U.S. Dec. 11, 1991) ("Given the clarity of the statutory text, respondent's burden of persuading us that Congress intended to create or to preserve a special rule [not expressed in the statutory language] is exceptionally heavy.").

II.

BMI also bases its next argument on the legislative history of the enactment. BMI is not asking us to use legislative history to assist in clarifying an ambiguous statute; we are being asked to use legislative history to rewrite the section 110(5) exemption to add new requirements.

BMI contends that the physical size of Edison's stores removes the chain and its individual stores from the protection of the section 110(5) exemption.[4] In order to reach such a result, BMI would have us read into the exemption a requirement that total space in the stores must not exceed 1055 square feet, with the area open to the public not to exceed 620 square feet. Brief of Appellant at 9, 11. The basis for this argument is a Supreme Court decision in a copyright case antedating the enactment of section 110(5) and the

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4 Edison asserts that the record on the size of its stores is inadequate for BMI to sustain this claim factually, regardless of its legal viability. *See* Brief of Appellee at 35 & n.13. BMI, on the other hand, claims that the record demonstrates the average square footage of Edison's unlicensed stores is 2268 square feet, with 800 to 1200 square feet open to the public. Reply Brief of Appellant at 18 n.11. Clearly this is a disputed question of fact, but in view of our holding that a store's physical size is not a factor that requires consideration under the statute, it is irrelevant and does not require resolution in order for us to affirm the District Court's entry of summary judgment in favor of Edison.

Report of the House Judiciary Committee relating to that section.

In *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), the Supreme Court had before it the issue of whether the proprietor of a food shop who installed and played a radio with four speakers on the premises of his business was required to pay licensing fees for the music thus provided for his patrons. The Court, holding that in so using a radio Aiken was not "performing" within the meaning of the Copyright Act, ruled that he was not. The House Report on the 1976 amendments to the Copyright Act suggests that the section 110(5) exemption was added to the Copyright Act in response to the Court's opinion in *Aiken*. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 86-87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5700-01. The Report indicates that the new exemption was intended to supersede the Court's holding in *Aiken* that the playing of a radio in a commercial establishment open to the public is not a "performance," and thus not an infringing act. At the same time, the Report suggests that on the facts of *Aiken* the Court's decision exempting Aiken from the payment of licensing fees was appropriate and deserving of codification.

The language from the Report upon which BMI focuses is this: "the Committee considers this fact situation [in *Aiken*] to represent the outer limit of the [homestyle] exemption, and believes that the line should be drawn at that point." *Id.* at 87, *reprinted in* 1976 U.S.C.C.A.N. at 5701. Even accepting *arguendo* the untenable proposition that we would give greater weight to what a House Committee "considers" than to the text the entire Congress enacts and the President signs, BMI neglects to point out that the "fact situation" described in the Report, which immediately precedes the above-quoted language, makes no mention of square footage: "Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5)." *Id.* Fur-

ther, the "fact situation" as described in *Aiken* makes no mention of the square footage of Aiken's shop:

> The respondent George Aiken owns and operates a small fast-service food shop in downtown Pittsburgh, Pa., known as "George Aiken's Chicken." Some customers carry out the food they purchase, while others remain and eat at counters or booths. Usually the "carry-out" customers are in the restaurant for less than five minutes, and those who eat there seldom remain longer than 10 or 15 minutes.
>
> A radio with outlets to four speakers in the ceiling receives broadcasts of music and other normal radio programing at the restaurant. Aiken usually turns on the radio each morning at the start of business. Music, news, entertainment, and commercial advertising broadcast by radio stations are thus heard by Aiken, his employees, and his customers during the hours that the establishment is open for business.

Aiken, 422 U.S. at 152.[5]

BMI directs our attention to several opinions where, BMI maintains, the square footage of the establishment attempting to qualify for the exemption was discussed.[6] Having reviewed

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5 Not only were square footage figures omitted from the Supreme Court's opinion in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), they also are nowhere to be found in either of the opinions from the courts below. *Twentieth Century Music Corp. v. Aiken*, 500 F.2d 127 (3d Cir. 1974) (subsequent history omitted); *Twentieth Century Music Corp. v. Aiken*, 356 F. Supp. 271 (W.D. Pa. (1973) (subsequent history omitted). Apparently, the dimensions of Aiken's shop first appeared in a published opinion in *Sailor Music v. Gap Stores, Inc.*, 516 F. Supp. 923, 924 (S.D.N.Y.), *aff'd*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982), filed some five years after the enactment of section 110(5). There is no indication of the source of the information in the *Sailor* opinion.

6 *See, e.g., Broadcast Music, Inc. v. United States Shoe Corp.*, 678 F.2d 816 (9th Cir. 1982) (square footage of the defendant stores was not even mentioned); *Broadcast Music, Inc. v. Jeep Sales & Serv. Co.*, 747 F. Supp. 1190 (E.D. Va. 1990); *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031 (D. Mont. 1990); *Crabshaw Music v. k-Bob's of El Paso, Inc.*, 744 F.

these cases, we reject as totally inaccurate BMI's assertion that "in virtually every case the excessive square footage of the defendant's store alone was found to disqualify the defendant from invoking the Section 110(5) exemption." Brief of Appellant at 27 n.14. The fact is that in none of these cases did the court base its decision solely on the square footage of the stores without considering the nature of the equipment, i.e., whether it was "homestyle," nor did any of them declare that they would have reached the same result based only upon the square footage of the infringing stores. Moreover, none of the cases cited has any binding precedential force in this Circuit.

The closest we come to Eighth Circuit precedent on this issue is this Court's dicta in *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986), in which the challenged action was the receipt via satellite antenna of blacked-out NFL games and the playing of the broadcasts on television sets in bars. Although the Court noted that "[t]he factors listed in the legislative history do speak of the size of the area where the transmission will be played," *id.* at 731, the Court said nothing about a maximum square footage. Further, the Court stated that the 1976 legislative history indicates that "to decide whether an infringement had occurred, the critical question instead would be the type of equipment used by the putative infringer." *Id.* at 730. The Court also quoted this language from the legislative history of the exemption:

> the clause would exempt small commercial establishments whose proprietors merely bring into their premises standard radio or television equipment and turn it on

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Supp. 763 (W.D. Tex. 1990); *Merrill v. Bill Miller's Bar-B-Q Enters., Inc.*, 688 F. Supp. 1172 (E.D. Tex. 1988); *Merrill v. County Stores, Inc.*, 669 F. Supp. 1164 (D.N.H. 1987); *International Korwin Corp. v. Kowalcyzk*, 665 F. Supp. 652 (N.D. Ill. 1987), *aff'd*, 855 F.2d 375 (7th Cir. 1988); *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021 (W.D. Pa. 1985); *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (M.D.N.C. 1985); *Sailor Music v. Gap Stores, Inc.*, 516 F. Supp. 923 (S.D.N.Y.), *aff'd*, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982).

> for their customers' enjoyment, but it would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus . . . into the equivalent of a commercial sound system.

Id. at 730-31 (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 87 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5701). Clearly, this passage from the legislative history directs attention to the quality of the sound system used, and not to the square footage of the establishment using it.[7]

Although the legislative history is interesting, it is beside the point; we need only look to the statute itself. If Congress intended to impose a physical size limitation on the establishment qualifying for the exemption, it might easily have written it into the statute. But it did not; it did not even qualify the exemption by limiting its availability to a "small commercial establishment," the language of the legislative history. The statute focuses on the equipment being used, and so must we. This Court is not a legislative body, and it has no authority to rewrite the statute.

The same observation applies fully to BMI's next argument: that the legislative history supports its contention that a section 110(5) exemption is available only if "the business [does] not have the ability to pay for its use of music or [is not] of sufficient size to justify, as a practical matter, a subscription to a commercial background music service." Brief

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7 If BMI wishes to base its argument here on language from the legislative history, it should also note the opening remarks of the portion of the House Report that discusses section 110(5):

> Unlike the first four clauses of section 110, clause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and *its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio* or television receiving apparatus *of a kind commonly sold to members of the public for private use.*

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 86 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5700 (emphasis added). That summary of the exemption makes no mention of any size or financial restrictions.

of Appellant at 11. The legislative history BMI relies upon is this:

> It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken*, which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt.

H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. 75 (1976) (citation omitted), *reprinted in* 1976 U.S.C.C.A.N. 5810, 5816.[8]

The intent expressed in the report of the House conferees is irrelevant when the statutory language does not say or even imply that the size or financial wherewithal of the establishment has a bearing on eligibility for the homestyle exemption. As with the square footage requirement that BMI would have us read into the exemption, the opinions of other courts that mention this language do not persuade us that, even though Congress enacted the law without any such requirement, it truly intended a size-and-financial-means test to be a part of the statute. *See Claire's Boutiques*, No. 91-1232, slip op. at 18 ("no case has relied solely on the financial size or ability of the defendant as a reason for denying the application of § 110(5)"). Moreover, we surmise that any such requirement would surely run into constitutional problems

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8 BMI argues for expansion of this putative requirement and suggests that "of sufficient size to justify . . . a subscription to a commercial background music service," the language found in the legislative history (and only in the legislative history), equates with "able to afford a commercial background music service or to pay the license fee to a performing rights organization." *See* Brief of Appellant at 29 ("it is beyond dispute that Edison has the ability to compensate the creators and publishers of the music that it uses in its stores"). This expansion would take us even further afield from the statutory language. The Eighth Circuit dicta BMI quotes as support for its argument says nothing about ability to pay: "the question as a practical matter is whether the defendant establishment is of the size and kind that Congress would expect to obtain a license through a subscription music service." *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 731 (8th Cir. 1986) (decision denying section 110(5) exemption based primarily on the type of equipment used).

for vagueness: who would determine when an establishment is "of sufficient size to justify . . . a subscription to a commercial background music service," and what criteria would they use?

We hold that 17 U.S.C. § 110(5) does not require that the square footage of a qualifying establishment be less than 1055, with fewer than 620 square feet open to the public; nor does it require that the entity's ability to pay for a commercial background music service be considered. The focus of the statute is on the equipment in use, and as each of Edison's unlicensed stores uses only homestyle equipment each qualifies for the homestyle exemption.

III.

Finally, BMI argues that the District Court's decision defeats the purpose of the Copyright Act and conflicts with this country's international treaty obligations. We find no merit in BMI's contention that the District Court's interpretation of the statute expands the scope of the homestyle exemption beyond the intent of Congress. *See Aiken*, 422 U.S. at 163 ("exaction of such multiple tribute [by authorizing the sale of numerous licenses for a single broadcast of a copyrighted work] would go far beyond what is required for the economic protection of copyright owners, and would be wholly at odds with the balanced congressional purpose behind "the exclusive right of public performance) (footnote omitted). If Congress had intended the exemption to be limited so as to exclude large retail chain stores such as Edison, it might easily have shown that intention in the language of the statute. It did not and we will not assume that the omission was a mere oversight on the part of the legislators. We note there is here no contention, nor could there plausibly be, of a " 'scrivener's error' producing an absurd result." *Union Bank*, 60 U.S.L.W. at 4046 (Scalia, J., concurring).

BMI's argument that this decision interferes with the international treaty obligations of the United States also fails. The treaty in question is the international copyright agreement

known as the Berne Convention. Berne Convention for the Protection of Literary and Artistic Works, S. Treaty Doc. No. 27, 99th Cong., 2d Sess. (1986). The Convention, signed on September 9, 1886, as revised at Paris on July 24, 1971, entered into force for the United States on March 1, 1989. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 13, 102 Stat. 2853, 2861 (1988). Congress then revised the Copyright Act (although section 110(5) was unaffected) and declared that the Act as amended "satisf[ies] the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose." *Id.* § 2(3), 102 Stat. 2853.

BMI asserts that the District Court's interpretation of section 110(5) to provide shelter for Edison under the homestyle exemption expands the scope of the exemption to such a degree that it renders section 110(5) in violation of the United States' treaty obligations under Article 11*bis* of the Berne Convention. Under that article, authors of artistic works have exclusive rights to authorize "the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work." Berne Convention, art. 11*bis*(iii), S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 44 (1986). The flaw in BMI's argument is that the District Court's interpretation of section 110(5) does not expand the homestyle exemption, but merely declares that the statutory language means what it says. We cannot presume that Congress, in enacting this languge, intended something else, and we know that Congress declared its handiwork to be consistent with the Berne Convention. Congress thus declared the public policy of the United States and, for us, that is the end of the matter.

Congress was emphatic that the United States' participation in the Berne Convention should not give rise to an expanded claim of copyright protection.

> No right or interest in a work eligible for protection under this title may be claimed by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto. Any rights in

> a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

17 U.S.C.A. § 104(c) (West Supp. 1991). In view of this unmistakably clear congressional directive, BMI's claim to a "right or interest . . . by virtue of . . . the adherence of the United States" to the Berne Convention cannot be sustained.

The judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2115EMSL

Filed: February 13, 1992

EDISON BROTHERS STORES, INC.,

Appellee,

—v.—

BROADCAST MUSIC, INC.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 13, 1992

A true copy.

ATTEST: /s/ Michael E. Gaus
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

MANDATE ISSUED 2/11/92

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. MISSOURI, E.D.

No. 90-328C(1)

April 3, 1991

EDISON BROTHERS STORES, INC.,

Plaintiff,

—v.—

BROADCAST MUSIC, INC.,

Defendant.

MEMORANDUM

NANGLE, *District Judge.*

A. BACKGROUND

Plaintiff brought this action for declaratory judgment, requesting the Court to declare that the employee radio policy of Edison Brothers Stores, Inc. ("Edison") falls within the "homestyle exception" of the Copyright Law of 1976, 17 U.S.C. § 110(5), and that Edison is under no obligation to pay licensing fees for the playing of music on consumer radio equipment by employees in its stores. Defendant Broadcast Music, Inc. ("BMI") asserts that Edison employees' radio use is not exempted, and that Edison should pay BMI a license fee for this alleged commercial and public performance broadcast of copyrighted musical recordings held by BMI as assignee of the public performance rights of the composers and publishers of the music.

This matter is before the Court on the parties' cross-motions for summary judgment, and their repeated representations that the matter can and should be disposed of on summary judgment. The essential facts of this case are not in dispute. Edison owns and operates approximately 2,500 shops selling shoes and apparel nationwide. These retail stores range in size from approximately 850 to 1200 square feet of selling space. Edison provides each store with one radio receiver unit and two box speakers, and prohibits its employees from playing tapes, cassettes, compact discs or anything else besides the radio in the store. BMI challenges this practice as a broadcast to the public of the radio programming, and since many of the songs heard on the radio are protected by BMI as assignee of the broadcast rights, then BMI wants Edison to buy a license to play its songs on the radio in Edison's stores.

B. SUMMARY JUDGMENT

In determining whether summary judgment should issue, the facts and inferences from these facts are viewed in the light most favorable to the non-moving party and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Once the moving party has met this burden, however, the non-moving party may not rest on the allegations in its pleadings but by affidavit and other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed.R.Civ.P. 56(e). *See also* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2739 (1983).

Recently, the Supreme Court noted that: "Summary judgment procedure is properly regarded not as a disfavored pro-

cedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action'." *Celotex*, 477 U.S. at 327, 106 S.Ct. at 2555 (quoting Fed.R. Civ.P. 1). Thus, the non-moving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1355. "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'." *Id.* at 587, 106 S.Ct. at 1356. The Eighth Circuit has acknowledged that the "trilogy of recent Supreme Court opinions" demonstrates that the courts should be "more hospitable to summary judgments than in the past" and that a motion for summary judgment "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those cases that really do raise genuine issues of material fact." *City of Mt. Pleasant, Iowa v. Associated Electric Cooperative, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

C. DISCUSSION

The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* ("Copyright Act"), gives a copyright holder certain exclusive rights in his or her copyrighted works, including the exclusive rights of public performance of musical works. *See* 17 U.S.C. § 106(4). However, there is an exception to the above rule found in 17 U.S.C. § 110(5), involving the reception and public playing of music broadcast over the airwaves, on simple equipment and in such a manner that duplicates the reception and playing of the radio by a private person in his own home (the "homestyle exception"). Title 17, section 110 states in pertinent part:

> Notwithstanding the provisions of section 106 [of this title], the following are not infringements of copyright:
>
> * * *
>
> (5) communication of a transmission embodying a performance or display of a work by the public recep-

> tion of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—
>
> (A) a direct charge is made to see or hear the transmission; or
>
> (B) the transmission thus received is further transmitted to the public; * * *

Edison has attempted to comply with the above requirements by imposing and enforcing in each of its stores the following radio usage policy ("Radio Policy"):

1. Only simple, low grade radio-only receivers are to be used.
2. Only two speakers may be attached to a radio receiver.
3. The speakers must be placed within 15 feet of the receiver.
4. Speakers that are built into the walls or ceilings must not be used. Only portable box speakers are allowed.
5. [Edison will a]dvise each store manager that they are not to use tapes, cassettes, or any other type of recording equipment in their stores. They are to play the radio only.

See Plaintiff's Motion for Summary Judgment, Exhibits 38, 17-85; Young Aff. at ¶¶ 5-10. Edison has submitted voluminous exhibits and affidavits to demonstrate its rigorous compliance with the above Radio Policy in each of its stores.

The homestyle exception was included in the 1976 Copyright Act specifically in response to the Supreme Court's decision in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 95 S.Ct. 2040, 45 L.Ed.2d 84 (1975). *Aiken* held that the owner of a small fried-chicken restaurant was not "performing" copyrighted works when he played a conventional radio through four ceiling-mounted speakers for the benefit of customers and employees. *See* 422 U.S. at 162-164, 95 S.Ct. at 2047-48. According to the legislative history of the 1976 Copyright Act, an act such as *Aiken*'s would be

considered a performance. *See* House Report No. 94-1476, 94th Cong. 2d Sess., at 87; *reprinted in* 1976 U.S.Code Cong. & Admin.News 5659, 5701 ("H.R. 94-1476"). To decide whether an infringement had occurred, the critical question instead would be the type of equipment used by the putative infringer. *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 730 (8th Cir.1986).

The drafters of Section 110(5) of the Copyright Act called "the use of a home receiver with four ordinary loudspeakers . . . the outer limit of the exemption," H.R. 94-1476, *supra* at 5701, and went on to state that:

> the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system.

Id.; *see National Football League*, *supra*, 792 F.2d at 730-31.

1. *Elements of Section 110(5)*

The elements of Section 110(5) that Edison must satisfy are (1) that it use a single receiving apparatus in its stores; (2) that the receiving apparatus is of a kind commonly used in private homes; and (3) that Edison does not further transmit or broadcast to the public the transmission it receives (the "second transmission" restriction). The Court finds that Edison has satisfied each of these elements through its Radio Policy.

The first element is satisfied in that each store that Edison owns and operates only uses one radio receiver at a time. The Court finds no merit in BMI's argument that the Court should focus on the number of stores, and thereby the total number of radios that Edison operates nationwide, rather than on the number of radios per store. The homestyle excep-

tion makes no sense unless it is applied on a store-by-store basis, to see whether each store is operating one set of simple radio equipment without extensive augmentation. It does not matter whether the owner repeats this compliance process for two or more stores.

BMI's argument would mean that any chain of two or more stores owned and operated by the same person would be disqualified from the Section 110(5) exception. The *Aiken* case, which carved out this homestyle exception, involved a defendant, Mr. Aiken, who owned and operated more than one place of business, *see Twentieth Century Music Corp. v. Aiken*, 356 F.Supp. 271, 272 (W.D.Pa.1973), and no court interpreting Section 110(5) has ever taken the position that operating two or more stores disqualifies a person from the exception. The Court finds that it is not appropriate to focus on the number of stores involved, but rather on whether each store duplicates the requirements of the homestyle exception. *Accord*, *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 754 F.Supp. 1324 (N.D.Ill. 1990).

Edison also satisfies the second factor, in that its Radio Policy requires the use of simple, low grade radio-only receivers, only two speakers may be attached to a radio receiver, and only portable box speakers are allowed. Edison's strict enforcement of its Radio Policy ensures that the abuses reported in other cases do not occur in its stores; abuses such as where high powered equipment, or equipment attached to large numbers of speakers, or equipment augmented by voice-over intercom systems and the like were passed off as "homestyle" radio systems. *See*, *e.g.*, Plaintiff's Reply and Opposition Memorandum, Appendix A; *National Football League*, *supra*, 792 F.2d at 731 (citing cases).

The equipment Edison employs is of a type generally sold for private consumer use, and the equipment is placed or installed in the stores in a manner duplicating its placement in a common household; *i.e.* the radio-only receiver unit is placed on or underneath a shelf, two normal box speakers are attached with ordinary speaker wire, and the wire is generally exposed to view, the speakers are placed on a shelf or hung on a wall near to the receiver, and speakers that are

built into the walls or ceilings may not be used. In this day of digital-audio-computerized-noise reduced technology, most modern stereo buffs would no doubt be aghast at the low-tech, low-performance and low cost of Edison's store equipment, but it appears that Edison is attempting to focus on simplicity, and the spirit of the exception when it was first promulgated in 1976.

Lastly, the Court finds that Edison has complied with the "second transmission" restriction of the homestyle exception. What this restriction means is that the homestyle operator may not rebroadcast or secondarily broadcast a radio transmission to the public without liability. A simple example of conduct that would violate this restriction is where the operator tapes a radio broadcast in order to play it later, with or without editing or augmentation. Certain courts have declared that other, less well defined conduct violates the restriction, such as where the speakers are so far from the receiver, or are remotely placed in a room different from the receiver, that the playing of the broadcast through the remote speakers constitutes a second transmission to the public. *See Claire's Boutiques*, *supra*, 754 F.Supp. at 1331, fn.17 (citing cases). The Court doubts the validity of an analysis of the distancing of the speakers in various stores, but in any case finds that Edison's policy to place the two speakers no more than fifteen feet from the receiver is well within the range of any modest homestyle setup, and does not violate the second transmission restriction.

2. *Size and Financial Criteria of Edison's Stores*

BMI also raised the argument that Edison's stores are not "small commercial establishments, whose size and annual revenue would not justify the purchase of a commercial background music service and a license with BMI." BMI points to language in the legislative history, H.R. 94-1476, *supra*, and to cases that have focused on these criteria to deny the exemption of Section 110(5). *See* Memorandum in Support of Defendant's Response to Plaintiff's motion for Summary Judgment, at 14-19. These cases have focused on the *Aiken*

business, its size and modest revenues, in finding that larger sized and more profitable businesses (which also had high-tech, augmented, non-homestyle equipment) were not exempted.

The Court notes that the criteria BMI stresses are nowhere to be found in the statutory section, and doubts the necessity to look beyond the clear terms of the statute to find hidden requirements in legislative history.

> Legislative history may show the meaning of the texts—may show, indeed, that a text 'plain' at first reading has a strikingly different meaning—but may not be used to show an 'intent' at variance with the meaning of the text. . . . Legislative history helps us to learn what Congress meant by what it said, but it is not a source of legal rules competing with those found in the U.S.Code.

Matter of Sinclair, 870 F.2d 1340, 1344 (7th Cir.1989). It is clear from the statutory language of the homestyle exception that Congress chose to focus on the type of equipment and the manner in which it is used, and not on the size or financial strength of the business that employs the equipment. Plaintiff's stores are all relatively small in size, although they generally exceed the selling area square-footage of the *Aiken* fast-food restaurants, and many of the stores would likely be found to be more profitable than *Aiken's* establishments. However, the Court adopts the reasoning of the court in *Claire's Boutiques*, 754 F.Supp. at 1332-1335, in finding that the size or financial strength criteria do not disqualify Edison's stores from the homestyle exception.

3. *Berne Convention*

BMI's last argument is that the Berne Convention for the Protection of Literary and Artistic Works, September 26, 1986, somehow limits the homestyle exception. The United States adopted the Berne Convention in 1988. *See* Berne Convention Implementation Act of 1988, Pub.L. No. 100-568, 102 Stat. 2853. BMI focuses on Article XI*bis* of the convention, which states that an author of a musical work possesses

the exclusive right to authorize the "public communication by loudspeaker or any other analogous instrument transmitting by signs, sound, or images, the broadcast of the work." Berne Convention, Art. XI*bis*(1)(iii). It is difficult to see how this provision even affects the homestyle exception of 17 U.S.C. § 110(5), but if there is any doubt on this matter, the Ad Hoc Working Group on United States Adherence to the Berne Convention apparently determined that Section 110(5) comports with the requirements of the convention. *See Final Report of the Ad Hoc Working Group* 16-17, *reprinted in* 10 Colum.-VLA J.L. & Arts. 516, 517 (1976). Furthermore, Congress amended Title 17, U.S.C. to add a provision stating in pertinent part:

> Any rights in a work eligible for protection under this title that derive from this title, other Federal or State statutes, or the common law, shall not be expanded or reduced by virtue of, or in reliance upon, the provisions of the Berne Convention, or the adherence of the United States thereto.

17 U.S.C. § 104(c) (West Supp.1990). The Court finds that the Berne Convention has no impact on the application of Section 110(5) in this matter.

D. CONCLUSION

Therefore, for the reasons stated above, the Court will grant plaintiff's motion for summary judgment and deny defendant's motion for summary judgment. The Court declares, pursuant to 28 U.S.C. § 2201, that plaintiff's "Radio Policy" is exempted by the "homestyle exception" of 17 U.S.C. § 110(5), and that plaintiff is not liable to defendant for licensing fees as to music played in plaintiff's stores pursuant to Edison's "Radio Policy".

APPENDIX D

The Berne Convention Implementation Act
102 Stat. 2853 (1988)

Sec. 2. DECLARATIONS.

The Congress makes the following declarations:

(1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1986, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the "Berne Convention") are not self-executing under the Constitution and laws of the United States.

(2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

Sec. 3. CONSTRUCTION OF THE BERNE CONVENTION.

(a) RELATIONSHIP WITH DOMESTIC LAW.—The provisions of the Berne Convention—

(1) shall be given effect under title 17, as amended by this Act, and any other relevant provision of Federal or State law, including the common law; and

(2) shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.

The Berne Convention for the Protection of Literary and Artistic Works

ARTICLE 36

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.

Berne Convention for the Protection of Literary and Artistic Works, Articles 36, 1 Copyright L. Rep. (CCH) ¶ 11,402.

ARTICLE 11 *bis*

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the public performance of their works, including such public performance by any means or process;

(ii) any communication to the public of the performance of their works.

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

Berne Convention for the Protection of Literary and Artistic Works, Articles 11 *bis*, 1 Copyright L. Rep. (CCH) ¶ 11,402.

APPENDIX E

Excerpts from The House Report and The House/Senate Conference Committee Report

> Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the committee considers this fact situation to represent the outer limit of the exemption, and believes that tne line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

H.R. Rep. No. 1476, 94th Cong., 2d Sess., pg. 87 (House Report), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659.

> With respect to section 110(5), the conference substitute conforms to the language of the Senate bill. It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975), which merely aug-

> mented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply.

H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. pg. 75 (House/Senate Conference Committee Report), *reprinted in* U.S. Code Cong. & Admin. News 5810.

APPENDIX F

LIST of EDISON BROTHERS' STORES SORTED BY GEOGRAPHIC LOCATION

List of Edison Brothers' 55 stores in Houston, Texas (Not Including Suburbs):

TRADE NAME	LOCATION
J RIGGINGS	ALMEDA MALL
SIZE 5-7-9	ALMEDA MALL
OAK TREE	THE GALLERIA
BAKERS	GREENSPOINT ML
JEANS WEST	GREENSPOINT ML
J RIGGINGS	GREENSPOINT ML
JOAN BARI	GREENSPOINT ML
OAK TREE	GREENSPOINT ML
SIZE 5-7-9	GREENSPOINT ML
WILD PAIR	GREENSPOINT ML
BAKERS	GULFGATE MALL
BURTS	GULFGATE MALL
JEANS WEST	GULFGATE MALL
OAK TREE	GULFGATE MALL
SIZE 5-7-9	GULFGATE MALL
WILD PAIR	GULFGATE MALL
BAKERS	MAIN STREET
FASHION CONSP.	MAIN STREET II
BAKERS	MEMORIAL CITY
CHANDLERS	MEMORIAL CITY
J RIGGINGS	MEMORIAL CITY
JW	MEMORIAL CITY
SIZE 5-7-9	MEMORIAL CITY
WILD PAIR	MEMORIAL CITY
BAKERS	NORTHLINE MALL
FASHION CONSP.	NORTHLINE MALL
OAK TREE	NORTHLINE MALL
WILD PAIR	NORTHLINE MALL
J RIGGINGS	NORTHWEST MALL
SIZE 5-7-9	NORTHWEST MALL

BAKERS	SHARPSTOWN CNTR
BURTS	SHARPSTOWN CNTR
CODA	SHARPSTOWN CNTR
FOXMOOR—FC	SHARPSTOWN CNTR
JEANS WEST	SHARPSTOWN CNTR
JOAN BARI	SHARPSTOWN CNTR
J RIGGINGS	SHARPSTOWN CNTR
OAK TREE	SHARPSTOWN CNTR
WILD PAIR	SHARPSTOWN CNTR
FOXMOOR—FC	THE GALLERIA
JEANS WEST	THE GALLERIA
SIZE 5-7-9	THE GALLERIA
WILD PAIR	THE GALLERIA
J RIGGINGS	TOWN & COUNTRY
BAKERS	WEST OAKS MALL
J RIGGINGS	WEST OAKS MALL
SIZE 5-7-9	WEST OAKS MALL
BAKERS	WESTWOOD MALL
SIZE 5-7-9	WESTWOOD MALL
BAKERS	WILLOWBROOK ML
J RIGGINGS	WILLOWBROOK ML
JOAN BARI	WILLOWBROOK ML
JW	WILLOWBROOK ML
SIZE 5-7-9	WILLOWBROOK ML
WILD PAIR	WILLOWBROOK ML

This information is extracted from the charts set forth in the joint appendix filed with the circuit court, at A-921-965 (list sorted by store number) and A-966-1045 (list sorted by the square footage of the stores).

Number of Edison Brothers' Stores per locale (cities and their suburbs grouped together):

Number of Stores	Locale of Stores
4	Abilene, TX
7	Akron, OH
7	Albany, NY
9	Albuquerque, NM
3	Alexandria, LA
6	Allentown, PA
4	Amarillo, TX
14	Anchorage, AK
3	Ann Arbor, MI
3	Annapolis, MD
6	Antioch, TN
1	Appleton, WI
2	Ashville, NC
3	Athens, GA
29	Atlanta, GA
3	Atlantic City, NJ
6	Attleboro, MA
5	Augusta, GA
15	Aurora, IL
9	Austin, TX
9	Bakersfield, CA
20	Baltimore, MD
2	Bangor, ME
11	Baton Rouge, LA
2	Battle Creek, MI
8	Beaumont, TX
3	Benton Harbor, MI
1	Billingham, WA
3	Billings, MT
4	Biloxi, MS
4	Binghamton, NY
6	Birmingham, AL
4	Bismarck, ND

7	Bloomington, IL
4	Boise, ID
21	Boston, MA
5	Bridgeport, CT
2	Bridgewater, NJ
5	Brownsville, TX
25	Buffalo, NY
3	Calexico, CA
5	Camden, NJ
2	Canton, OH
3	Cedar Rapids, IA
7	Charleston, SC
5	Charleston, WV
5	Charlotte, NC
3	Charlottesville, VA
7	Chattanooga, TN
1	Chelmsford, MA
7	Cherry Hill, NJ
1	Cheyenne, WY
92	Chicago, IL
20	Cincinnati, OH
41	Cleveland, OH
4	College Station, TX
5	Colorado Springs, CO
4	Columbia, MO
4	Columbia, SC
4	Columbus, GA
12	Columbus, OH
7	Corpus Christi, TX
1	Covington, KY
52	Dallas, TX
2	Danbury, CT
2	Daenport, IA
11	Dayton, OH
4	Daytona Beach, FL
25	Denver, CO
7	Des Moines, IA
64	Detroit, MI
2	Dothan, AL

1	Dover, DE
2	Duluth, MN
1	Eagle Pass, TX
2	East Brunswick, NJ
1	Eatontown, NJ
2	Edison, NJ
20	El Paso, TX
8	Elizabeth, NJ
2	Elkhart, IN
5	Erie, PA
1	Eugene, OR
4	Evansville, IN
2	Fairbanks, AK
4	Fairfield, CA
2	Fargo, ND
1	Farmington, NM
1	Fayetteville, AR
1	Fayetteville, NC
2	Flagstaff, AZ
9	Flint, MI
3	Florence, AL
2	Florence, SC
9	Forestville, MD
3	Fort Smith, AR
7	Fort Worth, TX
1	Frackville, PA
6	Fresno, CA
37	Fort Lauderdale, FL
3	Fort Myers, FL
5	Fort Wayne, IN
6	Gainesville, FL
1	Gainesville, GA
6	Gary, IN
1	Goodlettsville, IN
2	Grand Forks, ND
2	Grand Junction, CO
3	Grand Rapids, MI
2	Green Bay, WI
5	Greensboro, NC

5	Greenville, SC
1	Hammond, LA
1	Harlingen, TX
4	Harrisburg, PA
7	Hartford, CT
1	Hemet, CA
2	Hilo, HI
11	Honolulu, HI
3	Houma, LA
76	Houston, TX
7	Huntsville, AL
4	Huntington, WV
1	Hyannis, MA
2	Hyattsville, MD
18	Indianapolis, IN
1	Jackson, IN
1	Jackson, MI
8	Jackson, MS
13	Jacksonville, FL
1	Jacksonville, NC
1	Jensen Beach, FL
6	Jersey City, NJ
1	Johnstown, PA
4	Joliet, IL
4	Joplin, MO
4	Kalamazoo, MI
13	Kansas City, KS
22	Kansas City, MO
5	Kennewick, WA
2	Killeen, TX
9	Lafayette, LA
1	Laguna Hills, CA
1	Lake Charles, LA
1	Lake Grove, NY
7	Lansing, MI
8	Laredo, TX
2	Las Cruces, NM
21	Las Vegas, NV
1	Lawrence, MA

4	Lawton, OK
2	Leominster, MA
1	Lewisville, TX
2	Lexington, KY
2	Lima, OH
2	Lincoln, NE
1	Lincoln, RI
9	Little Rock, AR
2	Livingston, NJ
22	Long Island, NY
3	Longview, TX
137	Los Angeles, CA
8	Louisville, KY
4	Lubbock, TX
2	Lufkin, TX
1	Lynchburg, VA
4	Macon, GA
2	Madison, WI
3	Manchester, NH
1	Manhattan, KS
2	Maui, HI
6	McAllen, TX
2	Medford, OR
1	Melbourne, FL
12	Memphis, TN
1	Merced, CA
2	Meriden, CT
38	Miami, FL
1	Middletown, NY
2	Midland, TX
21	Milwaukee, WI
19	Minneapolis, MN
1	Minot, ND
2	Mission Viejo, CA
1	Missoula, MT
4	Mobile, AL
5	Modesto, CA
3	Monroe, LA
4	Monterey, CA

8	Montgomery, AL
1	Morgantown, WV
3	Naples, FL
4	Nashua, NH
5	Nashville, TN
1	New Albany, IN
2	New London, CT
32	New Orleans, LA
36	New York City, NY
2	Newington, NH
11	Norfolk, VA
7	Northridge, CA
1	Ocala, FL
1	Ocean, NJ
2	Odessa, TX
25	Oklahoma City, OK
11	Omaha, NE
17	Orlando, FL
6	Oxnard, CA
4	Palm Springs, CA
2	Panama City, FL
5	Panorama City, CA
2	Parkersburg, WV
5	Patterson, NJ
5	Pensacola, FL
2	Peoria, IL
49	Philadelphia, PA
1	Phillipsburg, NJ
29	Phoenix, AZ
37	Pittsburgh, PA
3	Pittsfield, MA
1	Plattsburgh, NY
2	Pocatello, ID
2	Port Charlotte, FL
1	Portland, ME
12	Portland, OR
2	Portland, WA
4	Poughkeepsie, NY
2	Pueblo, CO

17	Puerto Rico
4	Raleigh, NC
2	Rapid City, SD
6	Reno, NV
14	Richmond, VA
1	Ridgeland, AL
1	Riverside, CA
2	Roanoke, VA
1	Rochester, MN
20	Rochester, NY
5	Rockaway, NJ
1	Rockford, IL
16	Sacramento, CA
4	Saginaw, MI
1	Salem, OR
30	Salt Lake City, UT
3	San Angelo, TX
24	San Antonio, TX
2	San Bernardino, CA
36	San Diego, CA
36	San Francisco, CA
25	San Jose, CA
1	Santa Barbara, CA
2	Santa Fe, CA
2	Santa Monica, CA
2	Santa Rose, CA
1	Sante Fe, NM
6	Sarasota, FL
3	Savannah, GA
2	Scottsdale, AZ
36	Seattle, WA
3	Shreveport, LA
3	Sioux City, IA
3	Sioux Falls, SD
6	South Bend, IN
3	South Burlington, VT
5	Spokane, WA
4	Springfield, IL
6	Springfield, MA

3	Springfield, MO
1	St. Cloud, MN
2	St. Joseph, MO
14	St. Louis, IL
53	St. Louis, MO
4	St. Paul, MN
4	Steubenville, OH
5	Stockton, CA
9	Syracuse, NY
4	Tallahassee, FL
31	Tampa, FL
2	Temple, TX
2	Texarkana, TX
5	Toledo, OH
3	Toms River, NJ
2	Topeka, KS
6	Trenton, NJ
16	Tucson, AZ
13	Tulsa, OK
3	Tuscaloosa, AL
6	Utica, NY
3	Victoria, TX
1	Visalia, CA
3	Waco, TX
4	Warren, OH
5	Warwick, RI
33	Washington, DC
1	Waterbury, CT
1	Watertown, NY
1	Wausau, WI
6	West Palm Beach, FL
1	Westminster, GA
2	Wheaton, MD
7	Wichita, KS
1	Wichita Falls, TX
1	Wilkes-Barre, PA
3	Williamsport, PA
7	Wilmington, DE
3	Winston-Salem, NC

3	Worcester, MA
3	Yakima, WA
3	Yonkers, NY
1	York, PA
4	Youngstown, OH
1	Yuma, AZ

APPENDIX G

CASES ADDRESSING THE MAXIMUM SQUARE FOOTAGE LIMITATION ON THE APPLICATION OF SECTION 110(5)

The following courts considered the application of the maximum square footage limitation on a claim of entitlement to the Section 110(5) exemption, and found it to be a prerequisite to a grant of the exemption. The state of the law in these circuits and districts is thus now in direct conflict with the state of the law in the Eighth and Seventh Circuits.

CITATION	SQUARE FOOTAGE OF THE STORE(S) IN QUESTION	IMPACT ON EXEMPTION
Sailor Music v. The Gap Stores, Inc., 516 F. Supp. 923, 925 (S.D.N.Y.), *aff'd*, 668 F.2d 84, 86 (1981), *cert. denied*, 456 U.S. 945 (1982)	DISTRICT COURT: ". . . the size of the stores places The Gap beyond the section 110(5) exemption." (Finding average square footage of GAP stores to be 3,500 square feet.)	exemption denied
	CIRCUIT COURT: "[T]he Gap store in the instant case exceeds this outer limit as Judge Gagliardi properly held. It is much larger than the shop in Aiken which, as Judge Gagliardi concluded, indicates	denial of exemption affirmed

CITATION	SQUARE FOOTAGE OF THE STORE(S) IN QUESTION	IMPACT ON EXEMPTION
	that Congress did not intend it to be exempted from the mandates of the copyright law pursuant to section 110(5)."	
Broadcast Music, Inc. v. United States Shoe Corporation, 678 F.2d 816, 817 (9th Cir. 1982)	noting that the square footage of George Aiken's establishment represents the outer limit of the Section 110(5) exemption	exemption denied
Broadcast Music, Inc. v. Jeep Sales & Service Co., 747 F. Supp. 1190, 1193 (E.D. Va. 1990)	Noting that "Courts have been unwilling to apply the exemption where the physical size of the public space in which communication of the copyrighted material occurred is larger than that in *Aiken*. . . . Within this framework, the actions of Haynes Jeep must be said to exceed the 'outer limits' of the exemption."	exemption denied

CITATION	SQUARE FOOTAGE OF THE STORE(S) IN QUESTION	IMPACT ON EXEMPTION
Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1039 (D. Mont. 1990)	Defendants' gross square footage of 1,192 found to be "far exceeding *Aiken's* 'outer limit.' " Court held "On this basis alone, defendants have failed to show their restaurant is a 'small commercial establishment' as contemplated by the § 110(5) exemption."	exemption denied
Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763, 767 (W.D. Tex. 1990)	"The restaurant itself is of no small proportion, boasting some 7000 square feet of dining area. . . . Thus, this Court does not hesitate to find the facts above do not fit within the exception carved out under 17 U.S.C. § 110(5)."	exemption denied

CITATION	SQUARE FOOTAGE OF THE STORE(S) IN QUESTION	IMPACT ON EXEMPTION
Gnossos Music v. Quido DiPompo, 1989 Copyright L. Rep. (CCH) ¶ 26,483, at 22,937 (D. Me. 1989)	"defendant's restaurant is not a small commercial establishment of the kind which qualifies for § 110(5) exemption protection. With 1,824 square feet of space open to the public, the defendant's restaurant contains almost three times the public square footage of the fast food store in *Aiken*."	exemption denied
Lamminations Music v. P&K Markets, Inc., 1985 Copyright L. Dec. (CCH) ¶ 25,790, at 19,556 (N.D. Ca. 1985)	noted that the square footage of defendant's stores varied from 10,000 to 15,000 square feet	exemption denied
Little Mole Music v. Mavar's Supermarket, 12 U.S.P.Q.2d 1209, 1214 (N.D. Ohio 1989)	noted that "defendant stores range between 10,000 to 18,000 square feet open to the public."	exemption denied

CITATION	SQUARE FOOTAGE OF THE STORE(S) IN QUESTION	IMPACT ON EXEMPTION
Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc., 688 F. Supp. 1172, 1176 (W.D. Tex. 1988)	denied application of the exemption, stressing that the defendant's restaurants had "1000 to 1500 square feet of public dining area"	exemption denied
Merrill v. Country Stores, Inc., 669 F. Supp. 1164, 1170 (D.N.H. 1987)	"the size of defendants' Milford store precludes Section 110(5) applicability. With 13,000 square feet of floor space open to the public, the Milford store is nearly twenty-one times larger than the fast-food shop at issue in *Aiken*, well beyond the 'outer limit' of the Section 110(5) exemption."	exemption denied
Rogers v. Eighty Four Lumber Co., 617 F. Supp. 1021 (D.C. Pa. 1985)	defendant's stores all exceeded 10,000 square feet	exemption denied

CITATION	SQUARE FOOTAGE OF THE STORE(S) IN QUESTION	IMPACT ON EXEMPTION
St. Nicholas Music, Inc. v. D.V.W., Inc., and David Van Wagenen, 1985 WESTLAW 9624 (D. Utah 1985)	defendants' square footage of 2,000 to 3,000 exceed the *Aiken* outer limit	exemption denied
Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113, 1115, 1116, 1117 (M.D.N.C. 1985)	outdoor miniature golf course covering 7,500 square feet (the court acknowledged the limitation on square footage, but noted that the music was "scarcely audible without distortion even at very close proximity to the speakers"	exemption granted

APPENDIX H

CASES ADDRESSING THE ABILITY-TO-PAY LIMITATION ON THE APPLICATION OF SECTION 110(5)

The following courts considered the application of the ability-to-pay (i.e., suitability for a commercial background music service), limitation on a claim of entitlement to the Section 110(5) exemption, and found it to be a prerequisite to a grant of the exemption. The state of the law in these circuits and districts is thus now in direct conflict with the state of the law in the Eighth and Seventh Circuits.

CITATION	ABILITY OF DEFENDANT TO PAY NORMAL LICENSING FEES	IMPACT ON EXEMPTION
Sailor Music v. The Gap Stores, Inc., 516 F. Supp. 923, 925 (S.D.N.Y.), *aff'd*, 668 F.2d 84, 86 (1981), *cert. denied*, 456 U.S. 945 (1982)	DISTRICT COURT: "It is clear on the basis of uncontroverted affidavits of background music suppliers submitted by plaintiffs that The Gap is 'of sufficient size to justify, as a practical matter, a subscription to a commercial background music service.' "	exemption denied
	CIRCUIT COURT: "the store is 'of sufficient size to justify, as a practical matter, a subscription to a background music service.' "	denial of exemption affirmed

CITATION	ABILITY OF DEFENDANT TO PAY NORMAL LICENSING FEES	IMPACT ON EXEMPTION
Broadcast Music, Inc. v. United States Shoe Corporation, 678 F.2d 816, 817 (9th Cir. 1982)	decision based in part on the ability of the defendant to afford a background music service: "the size and nature of the operation justifies the use of a commercial background service."	exemption denied
Hickory Grove Music v. Andrews, 749 F. Supp. 1031, 1038 (D. Mont. 1990)	Holding that whether the defendants' business qualified as a "small commercial establishment" depends on the revenues of the business. "In the instant case, defendants have failed to disclose the revenues of their establishment—a puzzling omission, given defendants' burden of proving they fall within the 'home-style' exemption. This information would be useful to the Court's inquiry because it would permit the Court to judge	exemption denied

CITATION	ABILITY OF DEFENDANT TO PAY NORMAL LICENSING FEES	IMPACT ON EXEMPTION
	whether subscription to a background music service could be justified 'as a practical matter.' "	
Crabshaw Music v. K-Bob's of El Paso, Inc., 744 F. Supp. 763, 767 (W.D. Tex. 1990)	noting that "The restaurant itself is of no small proportion, boasting some 7,000 square feet of dining area and grossing between $800,000.00 and $900,000.00 in revenues annually. . . . Thus, this Court does not hesitate to find the facts above do not fit within the exception carved out under 17 U.S.C. § 110(5)."	exemption denied
Merrill v. Country Stores, Inc., 669 F. Supp. 1164, 1170 (D.N.H. 1987)	"defendants' $2.5 million in annual retail sales justifies subscription to a commercial background music system."	exemption denied

CITATION	ABILITY OF DEFENDANT TO PAY NORMAL LICENSING FEES	IMPACT ON EXEMPTION
Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc., 688 F. Supp. 1172, 1176 (W.D. Tex. 1988)	"it is clearly 'practical' for a chain of restaurants . . . grossing well over $500,000 annually to subscribe to a commercial background music service" and that "[d]efendants' prior subscription to a commercial background music service further establishes the inapplicability of the exemption to defendants' performances of copyrighted musical compositions."	exemption denied
Lamminations Music v. P&K Markets, Inc., 1985 Copyright L. Dec. (CCH) ¶ 25,790, at 19,556 (N.D. Ca. 1985)	defendant's stores were "of sufficient size to warrant a commercial background music system—a fact confirmed by defendants' testimony that they employ such a service at two of the [stores]."	exemption denied

CITATION	ABILITY OF DEFENDANT TO PAY NORMAL LICENSING FEES	IMPACT ON EXEMPTION
Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113, 1115, 1116, 1117 (M.D.N.C. 1985)	holding that any establishment large enough to be a potential customer of a background music service is not covered by the Section 110(5) small business exemption.	exemption granted